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THE

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Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1897.

The Right Hon. Sir Francis Henry Jeune, Knt., President.

The Hon. Sir John Gorell Barnes, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1897.

Lord HALSBURY, Lord Chancellor.

Lord RUSSELL of Killowen, Lord Chief Justice of England.

Lord ESHER, Master of the Rolls.

Sir FRANCIS HENRY JEUNE, President of the Probate, Divorce and Admiralty Division.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1896. 1897.

[IN THE CONSISTORY COURT OF LONDON.]

1896
July 23.

VINCENT AND TOMLINSON *v.* EYTON.

Ecclesiastical Law—Faculty—Jurisdiction—Affixing of Military Colours to Walls of Chancel of Parish Church—Interest—Member of Parliament—St. Margaret's, Westminster—Churchwardens—Confirmatory Faculty.

The Ordinary has jurisdiction to authorize by faculty the affixing of military colours as church ornaments to the walls of the chancel of a parish church where it appears that a former rector of the church has approved of their being placed in the chancel.

The rector of a parish church has no legal right without the sanction of a faculty to remove out of the chancel church ornaments, such as military colours, placed there without a faculty in a permanent position with the concurrence of a former rector and former churchwardens.

A member of the Commons House of Parliament has a sufficient interest to institute a faculty suit in respect of alterations in or additions to the parish church of St. Margaret's, Westminster:—

Semble, the churchwardens of a parish church to which military colours, no longer required for use in Her Majesty's service, have been presented,

1896

VINCENT v. EYTON.

have vested in them the legal property in the colours for the purpose of safe custody in all cases where the colours are not affixed to the freehold.

THIS was a cause of faculty instituted on behalf of Sir Charles Edward Howard Vincent, of No. 1, Grosvenor Square, in the county of London and diocese of London, Knt., C.B., a member of the Commons House of Parliament, and of William Edward Murray Tomlinson, "of No. 3, Richmond Terrace, Whitehall, in the parish of St. Margaret's, Westminster" (1), in the county of London and diocese of London, Esq.; a member of the Commons House of Parliament, for the purpose of obtaining a faculty for confirming the erection of a certain commemorative brass tablet in the chancel of the parish church of St. Margaret's, Westminster, in the county of London and diocese of London, and the affixing certain military banners to the east wall of the said chancel, from which they had been removed to another position at the west end of the church under the authority of the Reverend Robert Eyton, rector of the parish and one of the canons of Westminster Abbey.

The citation in the suit was filed on June 10 last. The substance of the material allegations in it describing the tablet and banners in question, their history, and the circumstances in which the banners, having been deposited in St. Margaret's Church, Westminster, without the sanction of a faculty, were affixed at the east end of the chancel, and subsequently removed from that position, may be summarised as follows:—

The colours in question—two in number—were presented to

(1) The site of No. 3, Richmond Terrace, appears to have at one time been within the limits of the Palace of Westminster (Wheatley and Cunningham, London Past and Present, ed. 1892, pp. 124, 163–4; 28 Hen. 8, c. 12; 5 Geo. 4, c. 100, ss. 39, 43); but any doubt which may on this account have existed as to the residents therein having ecclesiastically the rights of parishioners of St. Margaret's, Westminster, and being subject to the jurisdiction of the Consistory Court of London, would seem to have been put an end to by s. 29 of the 3 & 4 Vict. c. 113: "An Act to carry into effect, with certain modifications, the fourth report of the Commissioners of Ecclesiastical Duties and Revenues": and an Order in Council of August 8, 1845, "For carrying into effect certain alterations in the several dioceses of London, Winchester, Chichester, Lincoln, and Rochester . . ." (Ecclesiastical Commissioners' Orders in Council, vol. iii., p. 269). See *Combe* v. *De la Bere*, (1882) 22 Ch. D. 316.

the Westminster Volunteers, a regiment which had been formed in the year 1798 in consequence of the threatened invasion of this country by France, and, on this regiment being disbanded on the conclusion of peace in 1814, were presented at a solemn religious service to the church of St. Margaret's, Westminster, and were received by the then rector and laid by him upon the Communion Table in the church. Subsequently the colours were removed from the interior of the church and were placed in a room in the tower thereof, where they remained forgotten until 1886; and on Sunday, March 27, 1887, at a dedicatory service held in the church, they were again presented by the petitioner, Sir C. E. Howard Vincent, as Lieut.-Colonel Commandant of the 13th Middlesex (Queen's Westminster) Volunteers, formed in the year 1859, in succession to the regiment mentioned above as disbanded in 1814, in the presence of the Speaker of the House of Commons and a large congregation, and were accepted by the then rector of the church, the Venerable Frederick William Farrar, Archdeacon of Westminster, on behalf of the parish, and with the consent of the then churchwardens, for custody within the church, and were subsequently fixed one on either side of the east window in the chancel (1) about four feet from the same, and at a great height from the floor of the chancel. A brass tablet in commemoration of the presentation in 1887, being the tablet the erection of which it was sought to have confirmed by faculty (2), was afterwards affixed to the foot of the third pillar from the Communion Table on the south side of the chancel of the church. The flags remained in the position in which they had been placed in the chancel until Canon Eyton, having become the rector of the parish, removed them.

(1) This window is described and the history of it given in the report of *Peirson* v. *Gell* (1760–1762), Rothery's Return of Cases before the Delegates, No. 171, p. 85, and in "The Ornaments of Churches Considered," by Thomas Wilson, D.D., Oxford, 4to. 1761, Appendix, pp. 1–7. See also Walcott (Rev. Mackenzie, E.C.), The History of the Parish Church of St. Margaret in Westminster, from its foundation in A.D. 1064, 8vo. 1847, pp. 7, 9, 15–17.

(2) The text of the inscription on the tablet is set out in the judgment.

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The remainder of the petition alleged in effect that no application was made for a faculty to authorize the affixing of the brass tablet or of the colours to the arch and wall respectively of the chancel of the church; that on a date to the petitioners unknown, between the date of the induction of Canon Eyton as rector of St. Margaret's, Westminster, and March 15, 1896, he unlawfully and without applying for a faculty caused the colours to be moved from their position on the wall of the chancel of the church and to be placed elsewhere in the body of the church outside the chancel thereof; and that though the facts as to the affixing of the colours on the wall of the chancel were made known to Canon Eyton, and a request made to him by the petitioner, Sir C. E. Howard Vincent, to replace them there, he had refused, and at the date of the petition still refused, so to do, and the petitioner, W. E. M. Tomlinson, a parishioner of the parish, was desirous that the colours should be restored to the position originally assigned to them in the chancel.

The petition concluded with a prayer that a faculty might issue confirmatory of the erection and affixing to the arch of the chancel, of the commemorative brass tablet, and of the affixing of the colours to the wall of the chancel of St. Margaret's, Westminster, as set forth in the petition, and that Canon Eyton might be ordered by the Court to replace the colours in their original position against the wall of the chancel.

On June 20 last the citation in the suit issued directed to all persons having or pretending to have any interest in the premises, and was duly served by being affixed on the principal outer door of the parish church of St. Margaret's, Westminster, and, by a special order of the Court, a copy thereof was on June 25 last left at the rectory house of St. Margaret's, Westminster. Subsequently Canon Eyton entered an appearance in person as opponent, but did not bring in any pleading.

July 10. On this day the cause was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

Evidence in support of the petition was given orally by both

the petitioners, and by two other witnesses, and one of the churchwardens of St. Margaret's, Westminster, was called and examined by Canon Eyton. The result of the evidence is stated in the judgment.

J. B. Atlay, and *P. C. Probyn*, for the petitioners. The Court ought in its discretion to grant the confirmatory faculty asked for, and to make an order on the opponent to replace the flags in the position they occupied on the east wall of the chancel. The practice of depositing regimental colours and other flags in churches is a well-known one, and although this, it is believed, is the first occasion on which an application has been made to the ordinary to issue a faculty relating to such church ornaments, there can be no doubt but that, in strictness, they can only legally be introduced into parish churches under the sanction of a faculty; the same principles of ecclesiastical law being applicable to them as are applicable to any other additions to or alterations in the fittings or fabric of a parish church.

[They referred to Phillimore's Ecclesiastical Law, vol. ii., p. 1419, and the authorities there cited.]

Neither the opponent nor the churchwardens of the parish had any right to remove the flags from the position in the chancel in which they had been placed under the authority of the former rector. They had been placed there under the implied understanding that they should remain, and must be treated as in the same category as "monuments, coat-armour, and other ensigns of honour set up in memory of the deceased," all which, though introduced into a parish church without a faculty from the ordinary, cannot legally be removed at the pleasure of the incumbent: Gibson, Codex, pp. 453, 454; Coke, First Institute, 18 b; Third Institute, pp. 201, 202. Although in strictness a faculty ought to have been applied for before the presentation of the flags and the erection of the tablet referring to them, the circumstances set out in the petition and proved in evidence, including the fact that the consent of the late rector was given to the placing of the flags and tablet in the chancel, shew that the Court would, if applied to in the first

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instance, have granted a faculty sanctioning their position, and that the objection which will be taken, that the flags as placed on the east wall of the chancel obscured the east window of the chancel and did not harmonise with it, was quite untenable.

The opponent appeared in person, and submitted that the flags in the position they formerly occupied in the chancel, one on each side of the east window, obscured to the extent of about eight inches the side-lights of the window, and did not harmonise with the colour of the blue stained glass therein; that it was merely for these reasons that he moved the flags to a position in the church he thought more suitable for them, and that he had done so under a claim of right to move the flags within the church, as, assuming the facts alleged in the petition to be true, the flags had in 1814 become the property of the rector and churchwardens for the time being, and remained under their control notwithstanding anything that had subsequently occurred. If the Court decided to grant any faculty for the flags to be placed in the church, he asked that it should contain a proviso that the rector and churchwardens for the time being were to determine in what part of the church the flags should be affixed. As to the tablet, if it remained in the church the inscription on it should be altered in accordance with whatever the Court might decide with respect to the flags.

Cur. adv. vult.

July 23. DR. TRISTRAM. Questions of novelty and of some nicety have been raised in this case in relation to a practice, which has long prevailed, of depositing Regimental and former Volunteer flags, when no longer fitted or required for use, in our cathedral and parochial churches.

The two banners—the subject of this suit—were in 1798 given by His Majesty King George III. to the City of Westminster Infantry Volunteers, a regiment that had been raised during that year in the parishes of St. Margaret's and St. John's Westminster, to co-operate with other Volunteer corps, also

raised in various parts of the country, in resisting the then threatened invasion of Great Britain by the French Republic.

These banners were formally presented to the regiment on August 17, 1798, by the Countess Grosvenor, her husband, the first Earl Grosvenor, being the first commandant of the regiment.

On the restoration of peace in 1814 the regiment was disbanded; and on December 9 of that year the colours were deposited by Major Jones, late Major-Commandant of the regiment, in St. Margaret's Church, Westminster, by the permission of the two churchwardens of the parish, at a solemn religious service, when they were received by the then rector, and laid by him on the Communion Table of the church, "as a lasting memorial of the loyalty, patriotism, and zeal of the inhabitants of the two parishes, in times of the utmost danger to this country from the threatened invasion by France," as stated in a formal document put in evidence of that date, signed by Major Jones and retained by the churchwardens.

It does not appear in the evidence in what part of the church the colours were ultimately fixed, or for what period after that date they remained exhibited in the church; but in 1886 they were discovered, along with the document I have referred to signed by Major Jones, in two boxes in the tower of St. Margaret's in a state of disrepair.

In 1859, on the resuscitation and reorganisation of Volunteer regiments throughout the country, a regiment was raised called the Queen's Westminster Volunteer Rifles, a very large proportion of the officers and men being composed of inhabitants of the seven parishes of the City of Westminster, including certain companies or divisions specially raised in the parishes of St. Margaret's and St. John's. This regiment was considered as formed in succession to the one disbanded in 1814. The Duke of Westminster was the first Lieut.-Colonel Commandant, and is now the Honorary Colonel of this regiment; and Sir Howard Vincent, M.P., one of the petitioners in this suit, is the present Colonel-Commandant. It is described in the official Army List as the 13th Middlesex (Queen's Westminster) Volunteers.

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On the discovery of the colours in 1886 in the tower of St. Margaret's, Sir Howard Vincent, as Colonel-Commandant of this regiment, entered into negotiations with Archdeacon Farrar, then Rector of St. Margaret's, and now Dean of Canterbury, and the churchwardens of the parish, with a view to arranging for the colours being replaced in a prominent position in the chancel of the church, after a solemn dedicatory service.

The result of the negotiations was that the late rector and churchwardens consented to the colours being affixed to the walls of the chancel—the churchwardens undertaking for themselves and their successors their safe custody. After having been repaired and relined by the churchwardens, they were delivered to Sir Howard Vincent; and at a parade service attended by the regiment and held in the church on Sunday afternoon, March 27, 1887, they were presented by Sir Howard Vincent, in the presence of the Speaker of the House of Commons and of several Members of Parliament and a large congregation, to the churchwardens, in the following terms:—"I re-commit these ancient colours of the Westminster Volunteers to the safe keeping of the rector and churchwardens of the parish of St. Margaret's and St. John, to be placed in the chancel of this church, as a lasting memorial of the zeal, patriotism, and loyalty of the inhabitants of the City of Westminster." The churchwardens then carried the colours to the rector, who placed them against the screen behind the Communion Table, and proceeded with the service. They were subsequently, by the rector and churchwardens, affixed one on each side of the east window in the chancel, hanging down and pointing inwards. Shortly afterwards a brass tablet, at the expense of the regiment, was with the concurrence of the rector affixed to the foot of the third pillar from the Communion Table on the south side of the chancel, bearing the following inscription: "The Ancient Colours of the Queen's Westminster Volunteers, presented by George III. in 1798 on the threatened invasion of England by Napoleon I., were this day solemnly received on behalf of the Parish from Colonel-Commandant C. E. Howard Vincent, C.B.,

M.P., and the Officers, Non-Commissioned Officers and Citizens now serving to the number of one thousand, and placed in the Chancel of St. Margaret's Church as a monument of National Patriotism for the emulation of Posterity.

"Frederick W. Farrar, D.D., Archdeacon and Rector.

"Henry Hunt, Charles Wright, Churchwardens."

The colours remained in the place where they had been so affixed whilst Archdeacon Farrar was rector, but were removed to the west end of the church by his successor, Canon Eyton, who was inducted into the rectory in July, 1895, and who was unacquainted with their previous history and of the circumstances under which they had been placed there, and was under the impression that, as they had not been placed in the chancel by faculty, it was competent to the rector and churchwardens for the time being to remove them to another part of the church. Sir Howard Vincent first became aware of their removal on attending service at St. Margaret's in March, 1896, and thereupon addressed to Canon Eyton a letter, dated March 13, 1896, written by him as Colonel of the regiment and the officer with whom the engagement for the affixing of the colours in the place assigned to them in the chancel had been made by the late rector and churchwardens in 1887, and as a member of the House of Commons, of which the church had been the official place of worship for centuries, stating his objections to their removal, and asking Canon Eyton on reconsideration to replace them in their former position.

This request Canon Eyton declined to comply with; and thereupon Sir Howard Vincent, as a member of the House of Commons and Colonel of the regiment, and Mr. William Edward Murray Tomlinson, of 3, Richmond Terrace, Whitehall, as a parishioner of St. Margaret's and a member of the House of Commons, filed a petition in this Court in which the history relating to these colours is fully detailed, praying the Court—(1.) to order Canon Eyton to replace the colours in their original position against the walls of the church; (2.) to issue a faculty confirmatory of the erection of the brass tablet, and of the affixing of the colours to the chancel wall in the position they had formerly occupied.

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Mr. Atlay, as counsel for the petitioners, moved for the order and faculty as prayed, and examined witnesses in support of his application.

Canon Eyton opposed in person the application on the grounds that the flags in 1814 had become the property of the rector and churchwardens and their successors, and subject to their control as to their position in the church, and that they could not be treated as a fresh gift from the regiment by their re-presentation in 1887. His reason for removing them he said was that they disturbed the symmetry of the east window, and did not harmonise with the colour of its stained glass. He asked that a faculty, if granted, should provide that the position of the flags in the church should be subject to the control of the rector and churchwardens for the time being.

The first question arising on these facts is, whether Sir Howard Vincent has sufficient interest to give him a locus standi in this suit; and I am of opinion that as member of the House of Commons he has. After the ancient chapel of St. Stephens was given up for the sittings of the House of Commons, its members were accustomed to attend Divine Service in St. Margaret's Church, and from that time up to the present day it has been the official place of worship for members of the House of Commons on State and other occasions. In 1735 it was restored at the expense of Parliament, and there have been subsequent votes by the House for its reparation. There is a pew in the church appropriated for the Speaker of the House, and other pews for the use of its members, and in an extract in the *Parish Magazine* put in evidence it is designated—and ecclesiastically not inaccurately—"the parish church of the House of Commons"; the Palace of Westminster having been a Royal Peculiar and extra-Parochial, and St. Margaret's Church being the adjoining and nearest parish church.

The other petitioner, Mr. Tomlinson, has a locus standi in this suit, not only as a member of the House of Commons, but also as a resident parishioner in Richmond Terrace, Whitehall.

The next question is in whom was the property of the banners vested (assuming that they may be lawfully placed in

a church) on their presentation to the church in 1814; and the Court is of opinion that as they were not so fixed to the chancel wall as to become part of the freehold, the legal property in them—as of all moveable church ornaments and other church fittings—became vested in the churchwardens for the purpose of their being placed in the church as ornaments.

The Court is further of opinion that regimental colours may be appropriately placed in a church as ornaments. It has been held that coats-of-arms, court-armour, and ensigns of honour may be set up in a church in memory of a deceased person with the consent of the Ordinary. Thus Bishop Gibson in his Codex, p. 453, referring to Coke, Third Inst. p. 201, says, "Monuments, court-armour and other ensigns of honour set up in memory of the deceased" with the consent of the Ordinary cannot be removed at the pleasure of the Ordinary or incumbent; and in *Palmer* v. *Episcopum Exon.* (1)—in which case Sir Thomas Bury, having set up his arms in the church of St. David's in Exeter, the Ordinary promoted a suit in the Episcopal Court to deface them, as being set up without his consent—a prohibition was moved for on the authorities, that an action lies by the heir for defacing the monument of his ancestor; but Eyre and Fortescue JJ. said the Ordinary was judge what ornaments were proper, and might order them to be defaced.

If ensigns of honour may be appropriately set up in a church to the memory of an individual, the Court sees no reason why the colours of a regiment, when no longer fitted or required for use, should not be affixed in a church with which the regiment to which they belong is or has been in some way connected. It has been the practice for a long period of time for regimental colours, when no longer fitted or required for use, to be affixed in prominent positions in our cathedral and parish churches, with the express or tacit sanction of Ordinaries. It seems to the Court to be a commendable practice, and one which it may very properly sanction in this case by faculty.

In the present case, although the colours were introduced and placed in the church both in 1814 and in 1887 without

(1) 1 Stra. 575.

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a faculty, yet inasmuch as they were placed by the late rector with the concurrence of the churchwardens in a permanent position in 1887, it was not competent to his successor according to the cases to remove them without the sanction of a faculty.

On the 13th of this month I inspected the church in the presence of Canon Eyton, Sir Howard Vincent, and the churchwardens, when Canon Eyton informed me that he had found that there was a strong feeling amongst his parishioners in favour of the banners being replaced in the chancel; and that he was desirous to give effect to their wishes, and had therefore proposed to Sir Howard Vincent that they should be placed one on either side of the east window, only in a lower position on the wall than they were placed before he removed them, namely, in sockets just above the electric light boxes, which site and position were then approved by Sir Howard Vincent. A faculty will therefore issue for the banners to be affixed in the site and position agreed upon, and also confirmatory of the erection of the commemorative brass tablet affixed to the foot of the third pillar from the Communion Table. The faculty should be issued to the rector, churchwardens, and the petitioners; but in the circumstances Sir Howard Vincent, on behalf of the Queen's Westminster Volunteers, is to be given possession of it in order that it may be placed with the regimental archives of that corps. The petitioners should pay the costs of the faculty.

Solicitors for petitioners: *Fardell & Canning*.

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Nov. 17.

Admiralty — Practice — Arrest — Action in Rem — Guarantee — Lis Alibi Pendens—Staying Proceedings—Bail.

A British and a German ship came into collision near Rotterdam. The agents at Rotterdam of the owners of the two vessels exchanged written agreements on behalf of the respective captains to give bail to the extent of 50,000 guilders to answer the damages, interest, and expenses to which the captains might be condemned in virtue of the sentence of a competent court, and for the purpose of serving the writ the domicil of the captains was stated to be at the offices of the respective agents. The agents also procured from Lloyd's surveyor at Rotterdam an estimate of the amount of damages sustained by each vessel, but owing, it was alleged, to the owners of the German ship insisting on this estimate being conclusive, further negotiations between the parties fell through; and on the arrival of the German ship in this country she was arrested in an action in rem at the suit of the owners of the British ship.

The owners of the German ship moved the Court for an order for her release and a stay of all proceedings:—

Held, by Gorell Barnes J., that the guarantee was no bar to the action in this country, the vessel not having been arrested in Holland, and there being no legal proceedings pending there.

The Christiansborg, (1885) 10 P. D. 141, distinguished.

Motion by defendants, in an action in rem of damage by collision, for an order for the release of their vessel, and that all further proceedings by the plaintiffs might be stayed.

It appeared from the affidavits that on February 10, 1894, a collision occurred near Rotterdam between the British steamship *Salisbury*, owned by the plaintiffs, and the steamship *Mannheim*, owned by the defendants, a German company having its principal office at Bremen.

The agents at Rotterdam of the owners of the two vessels entered into mutual agreements on behalf of the respective captains to be answerable in damages. The material portion of the translation of the document, dated at Rotterdam, February 15, 1894, and signed by the agents of the owners of the *Mannheim*, ran as follows:—

"(The agents) shipbrokers at Rotterdam herewith declare . . . . to give bail on behalf of the (master of the *Mannheim* at

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present lying at Rotterdam) for (the master of the *Salisbury*) for the right payment of 50,000 guilders of the amount with interest and expenses for which said captain may be condemned in virtue of sentence given by the competent judge . . . . for indemnity of the damage sustained (by the plaintiffs' captain—that is, the plaintiffs—through the collision) . . . . and the undersigned declare that (the master of the *Mannheim*) is taking domicil at their office in this case for the writ to be served . . . . Good for fifty thousand guilders."

The agents of the owners of the two vessels also obtained from Lloyd's surveyor at Rotterdam an estimate of the amount of damage sustained by each vessel; but subsequent negotiations between the parties fell through, owing, it was alleged, to the owners of the *Mannheim* insisting on this estimate being conclusive as to the amount of damage sustained by the *Salisbury;* and on the arrival of the *Mannheim* in the Tyne on November 6, 1896, she was arrested at the suit of the owners of the *Salisbury*.

The owners of the *Mannheim* now moved for her release.

Sir Walter Phillimore, in support of the motion. The owners of the *Mannheim* having, through their agents, given the owners of the *Salisbury* this bail bond or guarantee somewhat in the nature of the proceeding in this country by way of a caveat warrant, and having elected to take through their captain their domicil for the purposes of the action at Rotterdam, and having also agreed to an estimate of the damage by Lloyd's surveyor, they have done all that is requisite to bring themselves within the principle laid down by the majority of the Court in *The Christiansborg*. (1) In that case it was held to be against good faith to arrest the vessel, as her owners had, by giving the guarantee set out in the report, purchased, for valuable consideration, the release of the vessel from the claim of the plaintiffs.

[GORELL BARNES J. There is an earlier case in which a vessel had been arrested in an action of damage in rem in the Admiralty Court in Ireland.]

(1) 10 P. D. 141.

Yes, *The Catterina Chiazzare* (1), and that case is relied upon by Baggallay L.J. in his judgment in *The Christiansborg*. (2)

In a later case, that of *The Jasep* (3), the same principle was applied, the judges of the Court of Appeal holding that it was not distinguishable from *The Christiansborg* (2), and agreeing with the judge in the Court below that the plaintiffs ought not to be put to their election, but the proceedings stayed. There is no suggestion that the guarantee given on behalf of the owners of the *Mannheim* is insufficient, as 50,000 guilders are equal to at least 3500*l*., and the amount claimed by the plaintiffs does not exceed 1000*l*.

Aspinall, Q.C., and *Butler Aspinall*, for the plaintiffs, the owners of the *Salisbury*. This is a matter of discretion, and the Court will not allow its jurisdiction to be ousted unless satisfied that there is a lis alibi pendens; but no legal proceedings have been taken in Holland, and no bail given there on which the vessel was released from arrest. It is true that by arrangement between the agents of the parties to prevent the arrest of the *Mannheim* in Holland, and in case it should be decided to litigate the matter there, security was given and taken in the form of a guarantee; but that is not enough.

In *The Christiansborg* (2) the vessel had been arrested, and there were proceedings pending in Holland. This case was followed in *The Jasep* (3), because there, again, there had been an arrest of the vessel, and there were legal proceedings pending in Holland.

That this was the ground of the decision is shewn by the case of *The Reinbeck* (4), in which the Court of Appeal refused to stay proceedings in this country because bail had been voluntarily given in the German Consular Court at Constantinople in order to keep the case there.

(1) (1876) 1 P. D. 368.

(2) 10 P. D. 141. The passage commencing at line 13 on p. 154 of the judgment of Baggallay L.J. in *The Christiansborg* should run thus: "If the case of *The Catterina Chiazzare* —referred to by the Master of the Rolls in his judgment—was rightly decided, I really am unable to distinguish between the circumstances of that case and those which we are now considering."—T. L. M.

(3) *Shipping Gazette*, May 4 and 31, 1896.

(4) (1889) 6 Asp. M. L. C. 366.

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Sir Walter Phillimore, in reply. It is true that in *The Reinbeck* (1) a stay of proceedings was refused; but the case has no analogy to that now before the Court, because there bail was given by the defendants designedly to force the plaintiffs to litigate in the foreign court. Here the defendants purchased the right for their vessel to navigate in all waters free from arrest. The decision of the majority of the judges in *The Christiansborg* (2) does not rest on the fact of the vessel having been arrested in Holland and released on bail, but that, whilst the guarantee was in existence, the arrest of the ship in England was against good faith.

GORELL BARNES J. I gather from the affidavits filed on this motion that the defendants do not dispute their liability for the damage sustained by the plaintiffs; but the plaintiffs seem anxious to recover the whole of that damage, whilst the defendants rely upon some arrangement made in Rotterdam which would limit the damages to the amount named in the report of a certain surveyor. However that may be, nothing seems to have been done, so far as legal proceedings are concerned, from the time of the collision until the *Mannheim*, being in this country, was arrested in the present suit by the plaintiffs in order to enforce their claim for damages. Upon that arrest being effected, the defendants move the Court to release the vessel, on the ground that the plaintiffs and the defendants have both entered into agreements in Holland guaranteeing the payment to each other of what may be found due of their respective claims, and the defendants allege that it is contrary to good faith for the plaintiffs now to be allowed to arrest the vessel and proceed against them in this country.

The plaintiffs, on the other hand, contend that there is no reason why they should not be allowed to proceed with this action, because they never arrested the defendants' ship in Holland, never began any legal proceedings against them there, and have done nothing to debar themselves from the present process.

The cases which have been referred to during the argument

(1) 6 Asp. M. L. C. 366. (2) 10 P. D. 141.

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of counsel lay down principles which are, I think, tolerably clear. The first seems to be this : that if the plaintiffs in any Admiralty suit in any country arrest the defendants' ship by the Admiralty process of that country, and the defendants, in order to carry on their ordinary business with the ship, put in bail according to the process of the Court to obtain the release of the ship, then it is considered unreasonable that the plaintiffs should afterwards re-arrest that ship in another country, because—as is very fully pointed out by Fry L.J. in *The Christiansborg* (1)—the fact of allowing the plaintiffs to arrest the vessel again would have a most oppressive and harassing effect on the defendants, who might have their ship arrested in one country after another as often as the plaintiffs chose. It is therefore said that if bail is put in in the suit, you have, by doing that, procured and purchased the release of your ship, so that she cannot be arrested again. That case, indeed, goes somewhat further, because it lays down, or at least the majority of the Court laid down—the Master of the Rolls differing—that where a vessel has been arrested and the plaintiffs have not insisted upon the form of putting in bail, but have been willing to accept an agreement or guarantee that any damages, for which the defendants may be found liable, shall be paid, then it is contrary to good faith to re-arrest the vessel which has been released on the strength of that agreement, for the defendants have purchased immunity from re-arrest by entering into the agreement.

In the present case a totally different state of things has arisen from that in any preceding case. No foreign legal proceedings were instituted by the plaintiffs against the defendants. The defendants' ship was never arrested; but the guarantee which was signed by the agents of the defendants declares their willingness to give bail. [The learned judge read the translation of the document already set out, and continued :—] It seems to me that in accepting that guarantee the plaintiffs have not done anything to debar themselves from arresting the defendants' ship. There have been no legal proceedings and there has been no arrest of the ship, and it is not, in my judgment, within the

(1) 10 P. D. 141.

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meaning of the document that there was any purchase of immunity from arrest in this country or in Holland. The motion must, therefore, be dismissed with costs.

Solicitors for plaintiffs, the owners of the *Salisbury*: *Botterell & Roche.*

Solicitors for defendants, the owners of the *Mannheim*: *Thomas Cooper & Co.*

T. L. M.

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THE PRINCESSE CLÉMENTINE.

Admiralty—Practice—Service of Writ—Foreign Corporation—Agent—Clerk—Rules of Supreme Court, Order IX., *r.* 8.

The defendants, a foreign corporation, had their name on the door of an office of their agents in London, and issued business cards and advertisements directing the public to apply to them there respecting the carriage of goods by their steamers running between Tilbury and Ostend. The rent of the office was paid by the agents of the defendants, and the clerks, including the manager, employed in the office, were the servants of the agents.

The plaintiffs, owners of cargo in a foreign ship, commenced an action for damages by collision against the defendants, and served the writ of summons on the managing clerk at the office in London. On motion by the defendants to set aside the service:—

Held, by Gorell Barnes J., that the service of the writ was not on "the . . . . clerk . . . . of such corporation" within the meaning of Order IX., r. 8, of the Rules of the Supreme Court, 1883, and must therefore be set aside, but without costs, as the defendants had held themselves out as having an office in London.

MOTION by defendants, the Société John Cockerill, owners of the steamship *Princesse Clémentine*, to set aside the service of a writ on the ground that the service was on a clerk of an agent of the defendants, and was therefore not served in accordance with the provisions of Order IX., r. 8, of the Rules of the Supreme Court, 1883. (1)

On December 1, 1896, the plaintiffs, the Société Anonyme de l'Usine du Français, and Besse Neveu Cabol Jeune of Mar-

(1) Order IX., r. 8:—

"In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . ."

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tinique and Bordeaux respectively, issued a writ of summons in an Admiralty action in personam against the defendants, claiming, "as owners of a cargo of sugar laden on board the *Axel Waestfelt*, damages occasioned through a collision which recently occurred between the steamship *Axel Waestfelt* and the *Princesse Clémentine*."

The indorsement stated that the writ was "served by H. P. Weston on the manager at the offices of the Société John Cockerill, Dominion House, 110, Fenchurch Street, E.C."

The defendants entered a conditional appearance and, in support of the motion to set the service aside, filed an affidavit by a member of the firm of Barr, Moering & Co., forwarding and shipping agents of 110, Fenchurch Street, and 72, 73, Fore Street, in the city of London, stating, in substance, that the defendants were a foreign corporation carrying on business in Belgium, and having no residence, office, or place of business, registered or otherwise, at 110, Fenchurch Street, or elsewhere in the United Kingdom; that they did not carry on any business, and had no clerk or other person in their employ, at that address or elsewhere in the United Kingdom authorized to act on their behalf; that the deponents' firm acted as brokers for the line of steamers run by the defendants between Tilbury and Ostend, and as such brokers looked after the collection and distribution of goods carried by the line, and also after the collection of the freights payable on this side; that the office at 110, Fenchurch Street was solely devoted to the carrying on of the business of deponents' firm in connection with the line of steamers, and that the firm was paid for their services by a commission upon the freights earned, together with an annual fixed allowance; that the rent of the office was paid by deponents' firm, no part being charged against the defendants; and that the furniture belonged to the firm; also, that all the clerks (including the manager at that office, Mr. Knight, upon whom the writ was served) were employed and paid by the firm.

An affidavit of the clerk to the plaintiffs' solicitors—who served the writ upon Mr. Knight, in charge of the office at 110, Fenchurch Street—stated that the office had on the door the words "Barr, Moering & Co., General Agents for the

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Société John Cockerill. Office. Daily Express Goods Service. London—Tilbury—Ostend"; and in the entrance to the building a name-plate was inscribed, "Société John Cockerill, Daily Express Service. London and Ostend." The affidavit also referred to three exhibits, namely: 1. The business card of the company, giving the names of steamers loading at Tilbury for Ostend with the times of departure, and concluding with the following: "For rates of freight from London or Tilbury and for particulars as to through rates and arrangements in connection with Continental railways and waterways; also for general information, apply at the company's offices, Dominion House, 110, Fenchurch Street, E.C."

2. A form of receipt-note for goods headed, "Société John Cockerill, offices, Dominion House, 110, Fenchurch Street, London, E.C."

3. Copies of advertisements which had appeared in the London daily papers, and of which one ran: "Daily fast goods service between London, Tilbury, Ostend and vice versâ. The steamers of the Société John Cockerill are now dispatched daily as above, taking goods at moderate freights. Further particulars, through rates, and other information, apply at the company's offices, Dominion House, 110, Fenchurch Street."

Lewis Noad, in support of the motion. The defendants are a foreign corporation, and the service was effected, not on an officer of the corporation, but on a clerk of their agents. It was therefore bad: *Nutter* v. *Messageries Maritimes* (1), even though the name of the defendants was on the door: *Grant* v. *Anderson & Co.* (2)

[He was stopped by the court.]

Stubbs, for the plaintiffs, contra. The defendants, though a foreign corporation not incorporated according to English law, have a place of business and trade in this country. They are, therefore, liable to be sued here without serving the process on the officer of the company at the head office abroad: *Newby* v. *Von* [read *Van*] *Oppen*. (3) The sole trading done at the office

(1) (1885) 54 L. J. (Q.B.) 527. (2) [1892] 1 Q. B. 108.
(3) (1872) L. R. 7 Q. B. 293.

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in Fenchurch Street is the carrying business of the defendants' line of steamers from Tilbury to Ostend. The name of the defendants is on the door, and their business cards and advertisements direct application to be made to the defendants at their office in Fenchurch Street. The service on Knight, the manager of the business at that office, was, therefore, good service: *Haggin* v. *Comptoir D'Escompte de Paris.* (1)

[GORELL BARNES J. The difficulty is that the distinction drawn by the cases is between an agent and an officer of the corporation. If, as a matter of fact, Knight is not the servant of the foreign corporation, but of the agent, then the service is bad.]

Barr, Moering & Co. are described on the door as "general" agents, and, therefore, the service will still be good as being on the manager of the London agency of the foreign shipping company: *Lhoneux, Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation.* (2)

Lewis Noad, in reply.

GORELL BARNES J. It appears from the affidavits that the defendants are a foreign corporation, and that they are represented in this country, for business purposes, by Barr, Moering & Co., who have an office in Fenchurch Street, which they have taken in their own name and for which they pay rent. This rent is not charged against the defendants, but the firm receives a commission upon the freights, and is also paid a fixed annual allowance for doing the defendants' business. It further appears that Mr. Knight is not manager for the defendant corporation, but is in the service of Barr, Moering & Co. as the manager of the business at the office in Fenchurch Street.

In a popular sense, no doubt, the business of the defendant corporation is carried on by the corporation in England, but I do not think that this is so in the eye of the law. It seems to me that the business carried on in this country is that of an agency for the defendant corporation, and that this agency is conducted by the firm of Barr, Moering & Co. It follows,

(1) (1889) 23 Q. B. D. 519. (2) (1886) 33 Ch. D. 446.

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therefore, that the person upon whom service was made was the servant of that firm, and not the servant of the corporation.

In the result I must hold that the service was not legally a service upon the corporation, as it was not a service upon their "clerk" within the meaning of Order IX., r. 8. As, however, the plaintiffs seem to have been led to issue their writ by statements publicly made by the defendant corporation, contrary to the fact, that the office in Fenchurch Street was that of the defendants, I shall, whilst setting aside the writ and all subsequent proceedings, do so without costs.

Solicitors for plaintiffs: *Stokes & Stokes.*
Solicitors for defendants: *William A. Crump & Son.*

T. L. M.

1896
Dec. 14.

[IN THE COURT OF APPEAL.]

FLUISTER *v.* FLUISTER AND HUTTON.

Practice—Divorce Suit—Notice of setting down for Trial—New Trial—Surprise—Divorce Court Rules, rr. 44, 47.

The solicitor of the petitioner for a divorce wrote to the respondent's solicitor a letter, headed with the title of the cause, in which he said, "I have set this cause down for trial." No other notice was served:—

Held, that this letter was a sufficient notice, within rule 44 of the Divorce Court Rules, of the cause having been set down for trial.

The respondent's solicitor, in the belief that a more formal notice ought to be given, did not watch the cause list, and the cause came on for trial without his knowledge, and a decree for a divorce was made in the absence of the respondent. She applied for a new trial on the ground of surprise.

The Court ordered a new trial on the undertaking of the solicitor personally to pay the costs thrown away.

MOTION by the respondent (the wife) to set aside the verdict of the jury at the trial of the action and the decree of Gorell Barnes J. for the dissolution of the marriage between the petitioner and the respondent, and that a new trial might be ordered, on the ground of surprise.

The wife had instructed a solicitor to defend her, and the same solicitor had been instructed by the co-respondent.

On July 7, 1896, the husband's solicitor wrote to the wife's

solicitor as follows: "*Fluister* v. *Fluister*. I have set this cause down for trial. You have not forwarded me a copy of the affidavit verifying your particulars, nor have you, as I understand, filed a copy of the affidavit verifying the answer."

The cause was in the list for trial on July 30, 1896, when no one appeared on behalf of either the wife or the co-respondent. The case was treated as undefended. The jury found that the wife had committed adultery, and the learned judge made a decree for dissolution of the marriage.

On the evening of the same day, the wife heard, for the first time, from a neighbour, that she had been divorced from her husband. She at once consulted her solicitor; and on August 7, 1896, notice of the motion for a new trial was served.

The wife's solicitor stated that in the letter of July 7 no formal notice of trial of the cause was inclosed, and that he had never received any such notice. For this reason he did not watch the cause list, and the cause came on for trial without his knowledge. The husband's solicitor said that a formal notice of trial was inclosed in the letter of July 7. A copy of the notice which he said he had inclosed in the letter was filed in the Registry in compliance with rule 47.

Clavell Salter, for the wife. No proper notice of trial was served on the wife. A printed notice in the ordinary form ought to have been served, and as this was not done the wife's solicitor was under no obligation to watch the cause list. He was justified in supposing that the cause had not been set down for trial. The letter of July 7 was not a sufficient notice under rule 44 (1) of the Divorce Court Rules.

(1) By rule 44, "In cases to be tried by a jury, the petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment of the same, in pursuance of the order of the Judge Ordinary, shall file such questions as finally settled in the Registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered."

Rule 47: "A copy of every notice of the cause being set down for trial or hearing shall be filed in the Registry, and the cause shall come on in its turn, unless the Judge Ordinary shall otherwise direct."

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R. J. Wills, for the husband. The letter of July 7 was a sufficient notice under rule 44 that the cause had been set down for trial. The solicitor was not justified in disregarding it. He is responsible for the blunder.

LORD RUSSELL of KILLOWEN C.J. In my judgment the letter of July 7 was a sufficient notice that the cause had been set down for trial. The solicitor has made a blunder. But he has at our suggestion offered to undertake (if the Court thinks he ought to do so) to pay personally the costs thrown away, including the costs of the present application. We think he ought to give this undertaking, and on these terms the order asked for will be made.

LINDLEY L.J. and A. L. SMITH L.J. concurred.

Application granted.

Solicitors: *Alfred Slater; C. W. Inman.*

W. L. C.

1896 *Dec.* 1.

BRADSHAW *v.* BRADSHAW.

Husband and Wife—Desertion—Neglect to provide reasonable Maintenance—Cohabitation—Jurisdiction of Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

In order to give jurisdiction to justices under so much of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, as provides that any married woman, whose husband shall have deserted her, or been guilty of wilful neglect to provide reasonable maintenance for her, and shall by such neglect have caused her to leave and live separately and apart from him, may apply to a court of summary jurisdiction for an order under the Act, it is essential that there should be a cohabitation which is broken by the act of the husband; but such cohabitation does not necessarily imply that the parties must be living together continually under one roof.

A married female domestic servant, who never lived with her husband under the same roof, was visited from time to time by him at the house of her mistress, and a child (which subsequently died) was born of the marriage in a lying-in hospital. The husband refused to receive his wife

in the house where he lodged, or to give her any help towards her maintenance:—

Held, that the cohabitation was sufficient to give jurisdiction to the justices under the above section to make an order under the Act.

Fitzgerald v. *Fitzgerald*, (1869) L. R. 1 P. & M. 694, and *Reg.* v. *Leresche*, [1891] 2 Q. B. 418, explained and distinguished.

APPEAL from the decision of justices, dismissing a summons taken out by the appellant under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground of want of jurisdiction.

The summons charged that the respondent had deserted his wife, and had wilfully neglected to provide reasonable maintenance for her, and had by such neglect caused her to leave him and live separately and apart from him.

The facts appearing on the depositions were shortly as follows:—

The appellant, a domestic servant, was married to the respondent on December 19, 1893, being at the time in the family way by him, and a child was born in a lying-in hospital. After the birth of the child the respondent, in answer to a letter from the appellant, said that he could not come to her or give her anything, and he in fact gave her nothing. The child shortly afterwards died, and the appellant had to sell and pledge her own goods in order to pay for the funeral expenses. The appellant went back to service, where she was at times visited by the respondent, and a second child was born in the hospital, which also died, and was buried by the appellant at her own expense, the respondent refusing to come and see the child or to give any help to the appellant. The appellant had been to the house where the respondent lived, and had been told by him that if her boxes were sent to the house they would be returned. The appellant and respondent had never lived together under the same roof. The respondent, who was a bootmaker and lived with his father, was called as a witness, and said that he was willing to maintain his wife but had no means. The solicitor for the respondent contended that the justices had no jurisdiction, on the ground that as there was no existing cohabitation there was no desertion, citing

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Fitzgerald v. *Fitzgerald* (1) and *Reg.* v. *Leresche* (2); and the justices refused to make an order on the ground of want of jurisdiction. (3)

Powles, for the appellant. The cases cited before the justices are not in point; they only go to shew that in those particular cases there was no desertion because there was no existing cohabitation, the parties having agreed to live apart. In the present case there was a cohabitation sufficient to give jurisdiction to the justices.

[He was stopped by the Court.]

Stephen Lynch, for the respondent. The language of s. 4 contemplates an existing cohabitation wrongfully put an end to by the act of the husband; here there was no such cohabitation, and no act of the husband causing the wife to leave him and live separately and apart from him so as to put an end to the cohabitation. The case is covered by *Reg.* v. *Leresche*. (2)

SIR F. H. JEUNE, PRESIDENT. The only question for us is one of jurisdiction. The justices held that they had no jurisdiction to entertain the application, and they so held upon the authority of the two cases of *Fitzgerald* v. *Fitzgerald* (1) and *Reg.* v. *Leresche*. (2) There is a very common misunderstanding of the effect of those two decisions. It is true that there cannot be desertion of a wife by a husband unless the cohabitation is broken by some act of desertion. But cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof; if that were so, there would be large classes of persons to whom the term could have no application: married domestic servants, for example, who cannot live day and night under the same roof, but yet

(1) L. R. 1 P. & M. 694.

(2) [1891] 2 Q. B. 418.

(3) By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, "Any married woman whose husband shall have . . . . deserted her, or whose husband shall have been guilty of . . . . wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such . . . . neglect have caused her to leave and live separately and apart from him," may apply to a court of summary jurisdiction for an order under the Act.

may cohabit together in the wider sense of the term. The two cases cited have one common feature: in each of them there were two persons living separate from each other by mutual consent, and not cohabiting together, and in such a case there clearly could not be desertion unless there were a resumption of cohabitation. In the present case there was cohabitation, and there were two children of the marriage; the husband then appears to have ceased to allow the wife anything, and to have refused to receive her boxes into the house where he lived; there was under those circumstances nothing more that the wife could do. It may well be that under such circumstances the husband could be held to have deserted his wife; at any rate, the fact that they were not living under the same roof is no ground for saying that the justices had no jurisdiction. As the justices decided the case upon the ground of their want of jurisdiction, they possibly did not have before them all the evidence as to the facts, and the case must go back to them for further consideration.

GORELL BARNES J. I am of the same opinion. The decision of the justices proceeded upon a misapprehension of the cases cited.

Appeal allowed.

Solicitor for appellant: *G. W. Lay.*

Solicitor for respondent: *C. Robinson, Hounslow.*

W. J. B.

1896
Nov. 9, 26.

In the Goods of SPRATT.

Probate—Grant of Probate—Conditional Will.

The deceased, a military officer on active service, wrote to his sister a letter in which he made use of the following language: "If we remain here taking pahs for some time to come the chances are in favour of more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place there is money at . . . . Keep this until I ask you for it."

Held, that the disposition of the deceased's property was not dependent on his death while on active service; that the document was not therefore a conditional will; and that, being good as a military will, it was entitled to probate.

Motion on behalf of the sister of the testator for a grant of letters of administration with the will annexed.

It appeared from the affidavits that the deceased, an officer in the army, was serving in New Zealand in the year 1864 during the Maori War, in which he was actively engaged. During the war he wrote to his sister, the applicant, a letter in the following terms:—

"Camp, Te Pa Pa, Tarranga,
"4th May, 1864.

"My dear Robe,—This is the most important part of my letter. If we remain here taking pahs for some time to come the chances are in favour of more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place there is money at Cox's, over 100*l.* in New South Wales Bank, New Zealand. Keep this until I ask you for it. Your affectionate brother, C. Spratt."

The testator survived the Maori War, and died on July 10, 1896, not having revoked the testamentary disposition contained in the above letter.

Inderwick, Q.C., and *Bargrave Deane*, for the applicant.

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The letter is a good military will. It is not conditional upon the death of the testator during the war, or to be operative during that period only. The reason why the testator made a will was the possibility of an accident happening at some time which might prevent him making one; the accidents which he had in his mind included his death at any time and from whatever cause. The document is entitled to probate as a military will.

[They cited *In the Goods of Mayd* (1); *In the Goods of Porter* (2); Williams on Executors (9th ed.), p. 157, n.]

Sir W. Phillimore and *Barnard*, for the next of kin other than the applicant. Although the document is a good military will, it is a conditional will; the language used shews the reason of the testator for making it to have been the recognition by him of the possibility of an accident happening to him during the war. It was his evident intention that the will should not remain in force after the end of the war.

[They cited *Roberts* v. *Roberts* (3); *In the Goods of Martin* (4); *Lindsay* v. *Lindsay*. (5)]

Cur. adv. vult.

Nov. 26. The following written judgment was delivered by

SIR F. H. JEUNE, PRESIDENT. The testamentary paper in this case consists of a holograph letter written by an officer in Her Majesty's army on May 4, 1864, while on active service in New Zealand. It is clearly, therefore, a valid will under the 11th section of the Wills Act. The only question is whether it is, on the true construction of its provisions, to be regarded as conditional. The following are the terms of the document in question: [The President read the document.] The testator died on July 10, 1896, of course long after the termination of the New Zealand War.

In cases of the character of the present, the difficulty which arises in determining the intention of the testator as expressed in his will is that an ambiguity is caused by the use of language

(1) (1880) 6 P. D. 17.
(2) (1869) L. R. 2 P. & M. 22.
(3) (1862) 2 Sw. & Tr. 337.
(4) (1867) L. R. 1 P. & M. 380.
(5) (1872) L. R. 2 P. & M. 459.

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which renders it doubtful whether the testator meant to refer to a possible event as his reason for making a will, or as limiting the operation of the will made. If the will is clearly expressed to take effect only on the happening, or not happening, of any event, cadit quæstio, it is conditional. If the testator says, in effect—that he is led to make his will by reason of the uncertainty of life in general, or for some special reason, cadit quæstio, it is not conditional. But if it be not clear whether the words used import a reason for making a will or impress a conditional character on it, the whole language of the document, and also the surrounding circumstances, must be considered. In such cases there are two criteria which are especially useful for determining the problem: first, whether the nature of disposition made appears to have relation to the time or circumstances of the contingency; and, secondly, where the contingency is connected with a period of danger to the testator, whether it is coincident with that period, because, if it is, there is ground to suppose that the danger was regarded by the testator only as a reason for making a will, but, if it is not, it is difficult to see the object of referring to a particular period unless it be to limit the operation of the will. The best illustrations of what I wish to convey are, I think, to be found in the various decided cases; and as they have not in any instance been considered as a whole, it may be worth while to review them.

The authority which heads the series is a decision of Lord Hardwicke's in *Parsons* v. *Lanoe*. (1) There a testator intending to go to Ireland, and probably to be there, as in fact he was, for some time, made a paper writing declaring it to be his last will in manner following: "If I die before my return from my journey to Ireland, that my house and land at Farly Hill . . . . be sold as soon as possible after my death," and then follow directions as to the disposition of the proceeds. The instrument as a whole was held to be conditional. I doubt if there is any ambiguity in the language in this case; but if there be, I think that the second of the tests which I have mentioned applies, because the period of contingency, that is

(1) (1748) 1 Ves. Sen. 189.

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the whole stay in Ireland, can hardly have been considered by the testator to be a period of special danger. The case of *Strauss* v. *Schmidt* (1), decided by Sir John Nicholl, is complicated by references to documents subsequent to the will, which the learned judge held should be considered as explaining its character, and shewing that the testator adhered to it. The words constituting the devise were written before the testator proceeded on a voyage, and were: "therefore as I may easily die, I think it my duty to inform you what you have to do with my property in case I should die." The will was held not to be contingent, this being, I think, an instance of the period of danger being the same as the period of the contingency. The case of *Burton* v. *Collingwood* (2) is a typical instance of a contingency being referred to only as a reason for making a will. The words were: "All men are mortal, and no one knows how soon his life may be required of him. Lest I should die before the next sun, I make this my last will and testament."

The first of the more recent cases is that of *In the Goods of Winn*. (3) The material words were: "Being on the eve of embarking for San Francisco, South America, or Mexico, do hereby, in the case of my decease during my absence being fully ascertained and approved." Sir Cresswell Cresswell, while saying that the Court was unwilling to set aside such testamentary papers, held that the words clearly made the will contingent. The case, indeed, seems on all-fours with *Parsons* v. *Lanoe* (4), which was relied on in argument. The case also of *Roberts* v. *Roberts* (5) was considered by Sir Cresswell Cresswell to be governed by *Parsons* v. *Lanoe*. (4) The testator wrote: "I leave in possession two bank-books to my wife . . . . should anything happen to me on my passage to Wales or during my stay"; then follow the dispositions. Here, the leaving of the bank-books pointed to a conditional disposition, and the period was one defined, and in part at least independent of special danger. In the case of *In the Goods of William Cawthron* (6) the material words were: "In the prospect of a

(1) (1820) 3 Phill. Ecc. 209.
(2) (1832) 4 Hagg. 176.
(3) (1861) 2 Sw. & Tr. 147.
(4) 1 Ves. Sen. 189.
(5) 2 Sw. & Tr. 337.
(6) (1863) 3 Sw. & Tr. 417.

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long journey, should God not permit me to return to my home, I make this my last will and testament"; but the will was not, in fact, validly executed till after the testator's return from his journey. The case is, therefore, not a direct authority; but it seems clear that Lord Penzance did not consider the language used to shew that the will was intended to be conditional. This would, if so, be consistent with the view that the period of danger apprehended by the testator and apparent period within which the will was to operate were the same; and by executing it after the journey the testator shewed that he did not in fact intend it to be conditional. In the case of *In the Goods of Thorne* (1) the testamentary document, which was a letter, contained the following expressions: "I request that in the event of my death while serving in this horrid climate or any accident happening to me, I leave and bequeath . . . . I consider that every person should be prepared for the worst, and particularly in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter." This letter was written on November 2, 1863; testator left Africa in July, 1864, invalided, and died on September 16, 1864, in London. Lord Penzance held that it "was not necessary to limit the operation of the will to the event of death while on the Gold Coast," or, as his Lordship is reported in 34 L. J. (P. & M.) pp. 131, 132, to have said: "The testator did not intend to limit its operation to the event of his death happening in Africa." I agree with Sir Walter Phillimore's suggestion that this means that the contingency contemplated by the testator was that of death from the effects of the climate of Africa, and that such contingency may be considered to have occurred in fact. I think also that the whole language of the document points rather to the testator feeling the necessity for making a will than desiring to limit the operation of it.

In the case of *In the Goods of Dobson* (2) the words were: "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave . . . ." Lord Penzance, after expressing unwillingness to refuse probate of a testamen-

(1) (1865) 4 Sw. & Tr. 36. (2) (1866) L. R. 1 P. & M. 88.

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tary paper on the ground that it was contingent, unless it was clear that the testator intended it should operate only in a given event or during a certain period, held that, as the operation of the will was not limited to a certain time, the case was not governed by *Parsons* v. *Lanoe*. (1) The testator's meaning, the learned judge said, was this: "My mind is drawn to the consideration that all railway travelling is attended with danger, and therefore I think I had better make my will." The same learned judge went further in the case of *In the Goods of Martin*. (2) The words used by the testator appear in terms to limit the operation of his will to the event of his death occurring during his stay on the floating hospital ship to which he was about to be removed for convalescence. The will was held not to be contingent, though it may be with some hesitation, as it was directed that before the grant issued the Queen's Proctor and persons interested should be cited. Here, certainly, there is a defined period. But I think this case may be regarded as an instance of the second test I have above suggested. The defined period is just the time that would elapse, if it did elapse, before the testator's recovery—in other words, was identical with the period of the danger which constituted the reason for his disposing of his property. There is a further statement in the will that he had no kindred or family, and therefore left his money to an asylum, which may, perhaps, have been considered by the Court to point to the will being intended to operate unconditionally. In the case of *In the Goods of Porter* (3) Lord Penzance, though reluctantly, and suggesting that the will might be propounded, held that the provision as to the disposition of the property shewed that the will was intended to be conditional. The testator, who was about to join his regiment in China, used the following language in his will: "Being obliged to leave England to join my regiment in China, and not having time to make a will, I leave this paper containing my wishes and desires. Should anything unfortunately happen to me while abroad I wish"—but he proceeded to add, "everything that I may be in possession of at

(1) 1 Ves. Sen. 189. (2) L. R. 1 P. & M. 380.
(3) L. R. 2 P. & M. 22.

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that time or anything appertaining to me hereafter to be equally divided." Lord Penzance held that the earlier words quoted would have left the case within *Dobson's Case* (1) and *Martin's Case* (2), but that the later words, "at that time," made the will conditional, notwithstanding the further words, "or anything appertaining to me hereafter," which his Lordship appears to have thought referred to property coming to the testator after his death—that is, a reversionary interest. It is not necessary to criticise this decision. I would only remark that this case illustrates both the criteria I have indicated above. The nature of the disposition was held to point to the will being contingent, although the period during which it was expressed to operate, being the period of the testator's danger, would not have made it so. It is not, I think, easy to reconcile the decision of *In the Goods of Robinson* (3) with those of *Martin's Case* (2) and *Porter's Case* (4), though by the same learned judge, nor with the case to be mentioned presently of *In the Goods of Mayd.* (5) The words were: "This is the last will and testament of me, George Twizell Robinson, that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London." It was held that this will was conditional—I presume because it was considered that there was no ambiguity. It was suggested by Sir Walter Phillimore that the fact that the will in the case last mentioned and that to be next mentioned were (as in the present instance) wills not executed under the provisions of the Wills Act, but were valid under the 11th section, at least aided the conclusion that they were conditional. But no such principle appears in the arguments or decisions, and I confess I do not see that the form of execution, or the reason for adopting that form, point one way rather than the other.

In *Lindsay* v. *Lindsay* (6) Lord Penzance held a mariner's will commencing, "Instructions to be followed if I die at sea or abroad," to be conditional. Probably these words were considered unambiguous, and it is also to be observed that a

(1) L. R. 1 P. & M. 88.
(2) L. R. 1 P. & M. 380.
(3) (1870) L. R. 2 P. & M. 171.
(4) L. R. 2 P. & M. 22.
(5) 6 P. D. 17.
(6) L. R. 2 P. & M. 459.

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period beyond that of sea voyage is contemplated. In *In the Goods of Hugo* (1), decided by Lord Hannen, the will was clearly unambiguous. It was to operate in the event, and only in the event, of the testator and his wife dying at one and the same time by one and the same accident, and from its terms clearly contemplated provisions intended to come into effect on such a contingency. In the last case to be mentioned —that of *In the Goods of Mayd* (2)—Lord Hannen supported the authority of the decision in *Porter's Case* (3), and, I think, gave his sanction to the principle that the period limited as conditional must not be merely that of the danger apprehended. The words were: "On leaving this station for Thargomindah and Melbourne, in case of my death on the way, know all men this is a memorandum of my last will and testament." This was held not to be conditional. It was suggested before me that only Dobson's and Porter's cases were referred to in argument, and the decision was, as many of such decisions are, ex parte. But the consideration of such cases in the Probate Registry before they come into court deprives such observations to some extent of their weight.

Applying the tests which I have above indicated to the present case, I think that the words "in case of an accident" point only to the reason why the testator desired to make a will. There is no expression of any period to be found in the document within which alone it was to be operative; on the contrary, the request that the will should be kept by his sister till he asked for it appears to me to shew that the testator had not in his mind any defined period of time at the expiration of which he intended that his will should cease to be effective. Nor is there anything in the disposition of the property which indicates that it was temporary, or that it did not apply to whatever property of which the testator might at any time be possessed. I am of opinion, therefore, that probate should be granted of the document in question.

Solicitors for applicant: *Moon, Gilks & Moon.*

Solicitors for next of kin: *Robbins, Billing & Co.*

(1) (1877) 2 P. D. 73. (2) 6 P. D. 17. (3) L. R. 2 P. & M. 22.

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HALFORD *v.* HALFORD.
(BRYCE, INTERVENER.)

Probate—Grant of Probate—Conditional Will.

A testator, a Scotsman, by his will gave the residue of his estate to his wife for life during widowhood, and in case of her re-marriage gave her one-third for life, the remainder to various legatees. There was no disposition of the residue after the wife's death in the event of her remaining a widow.

The testator, being about to sail with his wife from Calcutta to England, wrote a letter to his brother in England, which was in form a good testamentary document at Scots law, and contained the following: "If anything happens to us on the way my will has been accidentally packed away in a tin box to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan." The letter then proceeded to deal with the disposition of his estate after his wife's death, in the event of her surviving him. Neither the testator nor his wife died during the voyage:—

Held, that the letter was not conditional, but was a valid testamentary document, and must be admitted to probate.

THE plaintiff, as executor named in the will of Charles Scott Halford, who died on January 23, 1896, claimed to be entitled to probate in solemn form of his will, dated August 27, 1880; he also claimed a declaration whether the deceased died a domiciled Scotsman or Englishman, and a declaration whether one or both of two testamentary documents written and signed by the deceased but not attested, and dated April 2, 1889, and February 24, 1892, respectively, should be included in the probate.

The defendants, who were next of kin and legatees under the will of August 27, 1880, admitted the allegations in the claim.

The intervener admitted the allegations, except that the document of February 24, 1892, was a testamentary document or codicil, and that it was a valid testamentary disposition at Scots law, which he denied. He further said that the document of February 24, 1892, was not, and was not intended to operate as, a testamentary document, but only as a letter; and that, if executed as a testamentary document or codicil, it was

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only to take effect on an event which never happened—that is, the death of the deceased and wife on their way from Calcutta to England.

By his will of August 27, 1880, the testator, who was a Scotsman by birth, residing in India, bequeathed all his property to his wife, his brother (the plaintiff), and E. C. Daniell (who were also executors), upon trust to pay the sum of 500*l.* to his wife, and to pay the income of the residue of his estate to his wife during her widowhood; in the event of her re-marriage, the residue was to be divided into three parts—one to his wife for life, one to the plaintiff, and one to his brothers George and Samuel and his sister Elizabeth. The will did not dispose of the residue after the wife's death without re-marrying. The first codicil, of April 2, 1889, merely appointed another executor in place of E. C. Daniell. The second codicil, of February 24, 1892, consisted of a holograph letter written to the plaintiff by the testator from Calcutta, when on the eve of starting with his wife for England, and was witnessed. The material part was in these terms: "We go on board our steamer perhaps to-morrow night, or at latest on Friday morning. . . . If anything happens to us on the way my will has been accidentally packed away in a tin box to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan. If Nan survives me, the revenue of my estate goes to her for life; on her death 10,000*l.* to be paid in equal proportions to George, Sam, and Lizzie, or, in the event of their death, then to their children. The residue I leave to you." Both the testator and his wife arrived safely in England, where the testator took a house, in which he resided till his death on January 23, 1896. At the hearing evidence was given that both documents were valid testamentary documents at Scots law in point of form.

The only question which was ultimately argued and upon which judgment was given was whether the document of February 24, 1892, was conditional.

Inderwick, Q.C., and *Bargrave Deane*, for the plaintiff.

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Grazebrook, for the defendants.

Barnard, for the intervener.

Judgment was reserved, so as to be given at the same time as that in the preceding case of *In the Goods of Spratt.* (1)

Cur. adv. vult.

Nov. 26. The following written judgment was delivered by

SIR F. H. JEUNE, PRESIDENT. A similar question arises in this case to that which I have just decided. Charles Scott Halford, whose domicil of origin was Scottish, by his will, dated August 27, 1880, bequeathed his property, real and personal, to his wife, Jane Ann Halford, his brother, William Halford, and E. C. Daniell (for whom, by a codicil made on April 2, 1889, Thomas William Anderson was substituted), upon trust as to 500*l.* and certain articles to be selected by her for his wife, and for payment to his wife of the whole of the income derived from the residue of his estate. This payment was to be continued so long as his wife remained unmarried; if she re-married, the estate was to be divided into three parts—one to go to his wife for life with power to bequeath it by will, one to his brother William Halford, and the third to his brothers George and Samuel and his sister Elizabeth. The trustees were appointed executors. It will be observed that the will did not provide for the disposition of the testator's property after his wife's death if she did not re-marry. In 1892 the testator, who had been engaged in business in India, retired from business, and returned to this country. On the eve of embarking he wrote a holograph letter to his brother William, of which the material portions are as follows: [The President read the letter.] Neither the testator nor his wife died during the voyage.

The provisions of the above letter to some extent repeat and to some extent supplement the provisions of the will; how far the two are to be read together will be a matter of construction, if both are admitted to probate. The question to be decided is whether the letter constituted a testamentary document of a

(1) Ante, p. 28.

conditional character. I read the letter as saying in effect this: "I cannot lay my hand on my will of twelve years ago, and it may be lost on our voyage. I will, therefore, not only, in view of the dangers of our voyage to myself and my wife, say how I wish to supply an obvious omission in my will, but I will repeat its provisions, at least in part." If this be the fair construction of the letter, I can see no reason for saying that it is conditional. There is no period defined in which alone the will is to be operative, or, if such is to be inferred, it can only be the voyage itself—that is, the period of danger. There is nothing in the disposition of the property which points to a limitation of the effect of the will; on the contrary, the letter, by prescribing what is to become of his property after his wife's death if she does not marry again, makes so necessary and natural a provision that it can hardly be supposed it was intended to lapse so soon as the testator set foot in this country. I think, therefore, that the letter must be admitted to probate. It has been argued that, if so, it revokes the will, as it deals with the whole property. But I do not think it was the intention of the testator to revoke his will; the circumstances under which the letter was written, its language, and a comparison of its terms with those of the will, appear to me to shew the reverse. There will, therefore, be probate of the will, the codicil, and the letter; their effect, when read together, it is not now necessary to decide. The costs of all parties to be paid out of the estate.

Solicitors for plaintiff: *Sanderson, Holland, Adkin & Co.*
Solicitors for defendants: *S. M. & J. B. Benson.*
Solicitors for intervener: *Burton, Yeates & Hart.*

W. J. B.

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Dec. 1, 2.

[IN THE COURT OF APPEAL.]

ATKINSON *v.* MORRIS.

Probate—Will—Evidence—Admissibility—Execution in Duplicate—Revocation—Destruction of One Part—Declarations of Testator after Date of Will.

Declarations made by a testator after the date of an alleged will are not admissible to prove the execution of the will, and they are equally inadmissible to prove that the will was executed in duplicate.

Sugden v. *Lord St. Leonards*, (1876) 1 P. D. 154, explained.

In order to prove that a testatrix had executed her will in duplicate, and that she had revoked the will by destroying one of the parts, evidence was tendered of oral declarations to that effect, made by the testatrix after the date of the will:—

Held, that these declarations were inadmissible.

Decision of Gorell Barnes J. affirmed.

Motion by J. C. Morris, one of the defendants, that the verdict of the jury, at the trial of the action before Gorell Barnes J., finding that the alleged will, dated August 8, 1878, of Ann Keble Atkinson, widow, deceased, was duly executed; that at the time of the execution the deceased knew and approved of the contents thereof; that the execution was not obtained by the undue influence of the plaintiff C. T. Atkinson; and that the duplicate of the said will was not destroyed by the deceased with the intention of revoking the same; and the decree of the learned judge pronouncing for the force and validity of the will might be set aside and a new trial ordered. The grounds of the motion were—(1.) that the learned judge had misdirected the jury; (2.) that the learned judge had improperly rejected certain evidence tendered on behalf of the defendants, namely, evidence of oral declarations made by the testatrix, after the date of the execution of the will, to the effect that she had executed the will in duplicate, and that she had destroyed one part thereof with the intention of revoking it.

The testatrix was the widow of Thomas Atkinson, a builder. By his will he bequeathed his property to her, including his

business; and she carried on the business successfully after his death. By the will in question she, after bequeathing a few small legacies, devised and bequeathed to the plaintiff C. T. Atkinson (who was a nephew of her deceased husband) all her residuary real and personal estate. And she appointed C. T. Atkinson and his mother Emma Atkinson (the other plaintiff) to be executor and executrix of her will. The will was duly executed and attested by two witnesses. When it was found after the death of the testatrix, and as it was propounded by the plaintiffs for probate, it appeared that the signature of the testatrix had been erased by means of a line drawn through it with a pen, and that the signature of one of the attesting witnesses had been partly erased in the same way, and there was at the foot of the will the following note or memorandum in the handwriting of the testatrix: "Null and void, A. K. A. Through injustice on the part of Mrs. Emma Atkinson and family from time to time." No duplicate of the will was found.

The two defendants were the next of kin of the testatrix. They alleged that the will had been revoked by the destruction of the duplicate with the intention of revoking it. The only evidence tendered to prove this consisted of oral declarations to the effect above mentioned made by the testatrix after the date of the will to a Mrs. Lockyer, who lived with her. The learned judge held that this evidence was not admissible.

This report is limited to the question of the admissibility of the declarations.

Bayford, Q.C., and *Barnard*, for the applicant. The learned judge was wrong in rejecting the declarations made by the testatrix. The so-called will propounded by the plaintiffs shews ex facie not merely the animus revocandi of the testatrix, but that she had actually done to the document that which she thought would render it null and void; and the Court ought to struggle to give effect to her intention. The rejection of evidence of this kind opens the door to fraud, and on principle there is no such distinction between statements made by a testator before and those made after the execution of his will

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as to render the former admissible and the latter inadmissible in evidence: *Gould* v. *Lakes*. (1)

This so-called will is propounded by persons who take a large interest under it: so the case is within the 2nd rule in *Barry* v. *Butlin* (2), and the Court ought to be suspicious, "and to be vigilant and jealous in examining the evidence in support of the instrument": *Tyrrell* v. *Painton*. (3) At the hearing of this case the jury were told that this principle ought not to be applied.

[*Inderwick*, *Q.C.*, for the plaintiffs, referred to *Cheese* v. *Lovejoy*. (4)]

There are several ways in which a will may be effectually revoked, and one of them is by the physical destruction of the document, or documents, which alone forms or together constitute the will. The applicant's case is that this will was executed in duplicate; that both the duplicates were in the possession of the testatrix; and that the one which is missing was destroyed, while that which is forthcoming bears upon its face unmistakable evidence of animus revocandi on the part of the testatrix. There is, moreover, authority in favour of the defendants' contention. The decision in *In the Goods of Ripley* (5), that statements of a testator made after the execution of the will were not admissible in proof of the execution of the will, was founded on an obiter dictum of Lord Campbell C.J., unnecessary to the decision of the case, in *Doe* v. *Palmer* (6), which was also followed in *Staines* v. *Stewart* (7) and *Quick* v. *Quick*. (8) But subsequently there came an alteration in the law; and after a decision by Wilde J.O. in *Johnson* v. *Lyford* (9), that statements "made by a testator in and about the making of his will, when accompanying acts done by him in relation to that subject," were admissible, and a decision by Sir J. Hannen in *Keen* v. *Keen* (10), that a declaration by a testator that he had burnt his will was admissible evidence of intention, the question was dealt with by the Court of Appeal in *Sugden* v. *Lord St.*

(1) (1880) 6 P. D. 1, 6.
(2) (1838) 2 Moo. P. C. 480.
(3) [1894] P. 151, 157.
(4) (1877) 2 P. D. 251.
(5) (1858) 1 Sw. & Tr. 68.
(6) (1851) 16 Q. B. 747, 757.
(7) (1861) 2 Sw. & Tr. 320.
(8) (1864) 3 Sw. & Tr. 442.
(9) (1868) L. R. 1 P. & D. 546.
(10) (1873) L. R. 3 P. & D. 105.

Leonards. (1) In that case Lord Campbell's obiter dictum in *Doe* v. *Palmer* (2) was doubted and distinguished, and *Quick* v. *Quick* (3) was overruled; and it was held that in the case of a lost will declarations by a testator, whether made before or after its execution, were admissible evidence of the contents of the will, though no doubt Mellish L.J. differed as to declarations made after the execution. And this case and *Quick* v. *Quick* (3) (which was not overruled for this purpose) shew that declarations which are admissible for one purpose are admissible for another.

Further, in *Gould* v. *Lakes* (4), Hannen P. said (5): "I think that the case is governed by the decision of the Court of Appeal in *Sugden* v. *Lord St. Leonards* (1), and that any statements of the testatrix, whether made before or after the execution of the will—for I see no distinction between them—are admissible in evidence with a view of shewing what were the constituent parts of the will." The rule as to admissibility must, therefore, be taken to be thus extended.

A will executed in duplicate is only one will, and the destruction of one of the parts by the testator operates as a revocation of the will: *Colvin* v. *Fraser*. (6) In *The Aylesford Peerage* (7), where the legitimacy of a child born in wedlock was in question, it was held by the House of Lords that previous statements by the mother that the child was a bastard were admissible as evidence of her conduct. In *Sly* v. *Sly* (8) declarations of a deceased person who had been in possession of property, claiming a limited interest therein under a particular will, were admitted to prove the fact that that will had a legal existence, and also that certain persons were named executors therein.

[LORD RUSSELL of KILLOWEN C.J. In that case the deceased person whose declarations were admitted was not the testator. Is there any case in which declarations of a testator have been admitted to prove the execution of his will?]

The defendants are not aware of any. But the only actual

(1) 1 P. D. 154.
(2) 16 Q. B. 747, 757.
(3) 3 Sw. & Tr. 442.
(4) 6 P. D. 1.
(5) 6 P. D. at p. 5.
(6) (1829) 2 Hagg. Ecc. 266, 329.
(7) (1885) 11 App. Cas. 1.
(8) (1877) 2 P. D. 91.

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decision to the contrary is *In the Goods of Ripley* (1), which was founded upon the dictum of Lord Campbell C.J. in *Doe* v. *Palmer*. (2) No doubt in *Woodward* v. *Goulstone* (3) the House of Lords expressed doubts as to the correctness of the decision of the majority of the Court in *Sugden* v. *Lord St. Leonards* (4), though it was not necessary for them then to overrule it. If declarations of a testator are admissible for any purpose, what distinction is there between a declaration, "I have bequeathed 500*l.* to A.," and a declaration, "I have executed my will"? Either all declarations made by a testator after the date of his will should be admitted or none.

Inderwick, Q.C., and *L. D. Powles*, for the plaintiffs. Apart from the declarations of the testatrix, there is really no evidence of the existence of a duplicate will. If there were a copy the destruction of the copy would not operate to revoke the will. In *Gould* v. *Lakes* (5) declarations of a testatrix were admitted really as evidence of the contents of her will at the time of its execution, the fact of execution being admitted. It is well settled law that no declarations of a testator are admissible to prove the due execution of his will. This is distinctly stated by all the judges of the Court of Appeal who decided *Sugden* v. *Lord St. Leonards*. (6) None of those judges doubted the correctness of the proposition to that effect laid down by Lord Campbell C.J. in *Doe* v. *Palmer* (2), and they in fact adopted the decision in *In the Goods of Ripley*. (1) In *Sugden* v. *Lord St. Leonards* (4) the declarations which were admitted were declarations as to the contents of the will, the execution of which was admitted; but even there Mellish L.J. differed from the view of the majority of the Court as to the admissibility of declarations made after the execution of the will. It must be shewn that there was a duplicate will: declarations of the testatrix cannot be admitted to prove this. If there are two contemporaneous wills, effect will be given only to one of them.

[LORD RUSSELL of KILLOWEN C.J. That is, the two together constitute the will of the testator: *Killican* v. *Lord Parker*. (7)]

(1) 1 Sw. & Tr. 68.
(2) 16 Q. B. 747, 757.
(3) (1886) 11 App. Cas. 469.
(4) 1 P. D. 154.
(5) 6 P. D. 1.
(6) 1 P. D. 154, 227.
(7) (1754) 1 Lee Ecc. 662.

The plaintiffs have proved the only will of the testatrix; the destruction of a copy does not revoke the will.

In *Stobart* v. *Dryden* (1), the declaration of a deceased attesting witness to a deed that he had fraudulently altered the deed after its execution was held to be inadmissible as evidence. The distinction between the present case and *Gould* v. *Lakes* (2) is that here the execution of the supposed duplicate must be proved before there can be a duplicate will.

Bayford, Q.C., in reply. In *In the Goods of Ripley* (3) the meaning of Cresswell J.O. may have been that the declarations of the testator were not sufficient evidence to prove the execution of his will; not that they were not admissible.

LORD RUSSELL of KILLOWEN C.J. This motion for a new trial of the action is based on two grounds: (1.) that the learned judge misdirected the jury; (2.) that he improperly rejected evidence relevant to the issue which was tendered on behalf of the defendants. [His Lordship stated the facts, and continued:—]

The document which was propounded by the plaintiff, and which is a properly executed will if it has not been revoked, bears on its face the very clearest evidence that the testatrix did intend to nullify and revoke the will which she had made, and the Court would naturally be most anxious to give effect to her intention, if it can do so consistently with the settled rules of law. The question is whether it can do so. [His Lordship then dealt with the question of misdirection, coming to the conclusion that there had not been any. He continued:—]

I come now to the second point, and I repeat that no one can doubt that this lady intended to revoke her will, and that the Court ought to be astute to give effect to that intention, if it can do so consistently with the established and settled principles of law. The Wills Act has laid down the formalities which are to be observed in order to make an effective and operative will; and, if those formalities are not complied with,

(1) (1836) 1 M. & W. 615. (2) 6 P. D. 1.
(3) 1 Sw. & Tr. 68.

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the law steps in, and, however clear the intentions of the testator may have been, unless they are expressed conformably to the requirements of the statute, they are disregarded, and his estate is distributed as upon an intestacy. The statute also prescribes similar formalities in the case of the revocation of a will. When it is be revoked by writing, the writing must be attested with the same formalities as are required in the case of a testamentary disposition. It is clear, therefore, in the present case, that, although the intention of the testatrix to revoke her will was clearly expressed and expressed in writing, it is not expressed conformably to the statute, and the writing, which would have been perfectly good as a revocation if it had been duly attested, cannot be relied upon as evidence of revocation. But it is said that the revocation of a will may be worked in other ways; and this is perfectly true. It may under the statute be effected by the actual physical destruction of the thing—the document or documents constituting the will. And it has been decided (this is common ground between the parties before us) that, if a will has been executed in duplicate conformably to the statute, and possession is traced to the testator, and after his death one of those duplicates is found to have been destroyed, or is missing under circumstances from which the proper inference would be that it had been destroyed, the destruction of one of the two parts will operate as a destruction of the will. And, basing their case upon that view, the defendants' contention is, that the will of this testatrix was in fact executed in duplicate, that both duplicates were in her possession, that one of them is missing, and, therefore, presumably destroyed, and that the other, which is here, has indications on its face that it was the intention of the testatrix to revoke it, and that consequently the will must be taken to have been revoked. The question is, whether the defendants are in a position, or were in a position at the trial, to support that contention by legally admissible evidence.

Upon the evidence as it stood at the trial, independently of that which the learned judge rejected, it is impossible to say that there was any case to go to the jury in support of this contention; and I do not understand the learned counsel for the

defendants to suggest that, as matters then stood, the jury could have come to any other conclusion than that the will was not executed in duplicate. But it is said that evidence was tendered to prove statements of the testatrix that she had executed her will in duplicate which, if it had been established, would have entitled the defendants' counsel to contend that, one of the duplicates being destroyed, or the presumption being that one of the duplicates was destroyed, the animus revocandi being clear, the whole will was destroyed and revoked. The short point, therefore, is this: Is the declaration of the testatrix, which it was sought to prove, made after the execution of the will, evidence admissible in law that she executed her will in duplicate? I have come to the conclusion that it is not, anxious as I should be to admit it if it were possible to do so. It is to be observed that the rules of evidence which prevail in this country are much less liberal and wide than those which prevail in many other enlightened countries, and that our rules of evidence shut out large bodies of testimony which are received, and I confess, for myself, I think are properly received, in other countries—evidence of great cogency and probative force. But we have to deal with settled rules which have come down to us, and which have been long acted upon. We cannot disturb them. The evidence offered in this case was in effect hearsay evidence—statements said to have been made ex post facto by the testatrix herself.

There are certain clearly recognised exceptions to the general rule that hearsay evidence is not admissible. One exception is, declarations against interest; another is, statements made or recorded in the course of business by a person whose duty it is to make or to record them; another is, evidence in a case of pedigree. And undoubtedly, in addition to those exceptions, a series of cases, which I need not enumerate, have established some further exceptions as to statements made by a testator before the execution of his will, and tending to make clear his intentions and to shew what he intended his will to contain. No doubt *Sugden* v. *Lord St. Leonards* (1) goes still further, and extends the admissibility to statements as to the contents

(1) 1 P. D. 154.

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of the will made by the testator after the will has been executed. As regards that case, I will only say that, if it were necessary for us to consider the point, we should be bound by the decision upon it. But it is to be observed that that extension, the limit of which is clearly fixed by that case, did not receive the approval of distinguished lawyers in *Woodward* v. *Goulstone*. (1) It is not, however, necessary for us now to consider that case. Accepting the decision to the full extent to which it goes, it still falls short of that which it is necessary for the defendants to establish in order to support the admissibility of the evidence which the learned judge rejected. There is no case to be found which goes the length of saying that statements made by a testator to the effect that he has executed a will are admissible evidence in substitution for the proper and regular evidence of the fact of the execution of the will conformably to and with the formalities enjoined by the Wills Act.

I regard as authorities by which we are bound (and I agree with them), *Doe* v. *Palmer* (2), *In the Goods of Ripley* (3), and, finally, *Sugden* v. *Lord St. Leonards* (4), in which both the previous cases were referred to with approbation; and they establish the rule that statements made by a testator are not admissible to prove the execution by him of a will. If such statements are not admissible to prove the execution of a will conformably to the statute, is there any distinction in principle between that case and the present case in which it is sought by evidence of statements of the testatrix to prove that she executed her will in duplicate with the view of proving revocation of the will? I can see none. The statute enjoins that the same formalities are to be observed in the case of a written revocation as in the case of a will.

On these grounds I have come to the conclusion that neither on the ground of misdirection nor upon the ground of refusal to admit evidence can this application be supported, though I confess I am sorry that we cannot give effect to the clear intention of the testatrix.

But I think that the defendants were well justified in raising

(1) 11 App. Cas. 469.
(2) 16 Q. B. 747, 757.
(3) 1 Sw. & Tr. 68.
(4) 1 P. D. 154.

this question in the Court below; and, although this is not a matter with which we can interfere, I regret that the learned judge visited the defendants with the costs of the Probate action.

The appeal will therefore be dismissed, but without costs.

LINDLEY L.J. I am of the same opinion. As regards the alleged misdirection of which the defendants complain, I do not think it necessary to add anything to what my Lord has said.

The appeal really turns upon the admissibility or inadmissibility of the evidence which was tendered on behalf of the defendants and rejected. The defendants desired to prove that this will was made in duplicate, and that the testatrix destroyed one of the duplicate parts intending to revoke the will. That defence, if proved, would have been a complete answer to the plaintiffs' case. But what was the evidence in support of the defence which the defendants had to adduce? They had nothing except evidence of statements made by the testatrix —first, that she had made her will in duplicate; and, secondly, that she had destroyed one of the parts. Now, I confess I cannot see how a declaration by the testatrix that she had made a duplicate will can be distinguished in principle from a declaration by her that she had executed a will. It was ingeniously suggested by the defendants' counsel that, as the two duplicates made one will and the execution of the will is not in any way contested, the declarations of the deceased might be admissible as shewing that the will was contained on two pieces of paper instead of one. But, when you recollect what a duplicate is—namely, a document signed and attested as required by law to constitute a valid testamentary document, and not merely a piece of paper—I think that to hold this evidence admissible on that ground would be extremely unsatisfactory. To distinguish between a will and a duplicate will would be very like splitting hairs. There is no principle which can justify the distinction. I look upon the question, therefore, as simply this—whether the declaration of a testator that he has executed a will can be received as evidence of the execution.

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On that point we have the decision in *In the Goods of Ripley* (1) excluding such testimony; and that decision was distinctly approved by the Court of Appeal in *Sugden* v. *Lord St. Leonards*. (2) The Court there held that statements made by a testator after the execution of his will were admissible evidence of the contents of the will; but the Court did not quarrel with the decision in *In the Goods of Ripley* (1); on the contrary, the Court approved it.

Now, looking at the matter on principle, can we bring such declarations as have been rejected in the present case within any of the recognised exceptions to the inadmissibility of hearsay evidence? I confess I cannot. Those exceptions are perfectly well known: they were enumerated by Jessel M.R. in *Sugden* v. *Lord St. Leonards*. (2) Reliance was placed on the principle upon which the exceptions are based which was expounded by the Master of the Rolls. But that principle as then expounded would let in a great deal of evidence which is not admissible by law. This was pointed out by Mellish L.J., and also by Lord Herschell in the House of Lords in *Woodward* v. *Goulstone*. (3) This case does not fall within the recognised exceptions. According to the settled rules of evidence, for which this Court is not responsible, the evidence tendered was not admissible. The decision of the learned judge was right in point of law. It is obvious that the testatrix intended to revoke this will: she did all she could to revoke it, except what the law requires. If her memorandum at the foot of the document had been attested by two witnesses, or if she had thrown the document into the fire, there would have been no doubt about the revocation. But, as it is, she has not done that which the law requires to effectuate her intention.

A. L. SMITH L.J. I own that I have struggled during the argument of this case to escape from having to hold that this will of August 8, 1878, as it now stands, expressed the intention of the testatrix at the time of her death. I have not the slightest doubt that it did not then express her intention, and

(1) 1 Sw. & Tr. 68. (2) 1 P. D. 154.
(3) 11 App. Cas. 469.

I have looked carefully to see whether we could not get out of the difficulty in which we are placed in holding that this was her last will and testament at her death when I know it was not her intention that it should be. I wish to point out that the real reason why her intention cannot be carried out is not because of any failure in the administration of the law, but on account of the provision made by the Legislature (of which I am not complaining) in s. 20 of the Wills Act, which lays down a hard and fast rule as to the way in which a will can be revoked. This lady obviously did not know the provisions of the Wills Act; and, although she did what I suppose ninety-nine persons out of a hundred who did not know the Wills Act would have done, and would have thought effectual to revoke a will, still what she did was inoperative, because it was not one of the modes of revocation prescribed by the Act. As to her intention there can be no possible doubt. She did intend to revoke the will; but, by reason of the provisions of the Wills Act, her intention is not operative, because she has not carried it out in accordance with s. 20 of the Wills Act, and therefore she has not revoked the will according to law. I agree that there was no misdirection by the learned judge; and on the point which has been chiefly argued, I find myself bound by authority. The will which is produced is not revoked according to the formalities required by the Wills Act; but, if it could have been shewn that the testatrix, when she executed her will on August 8, 1878, executed a duplicate, and that that duplicate had been destroyed, this would no doubt have operated as a revocation of the document which she intended to revoke by the memorandum which was found upon it after her death. But the difficulty is this: the defendants, who alleged that she executed her will in duplicate, could not prove the execution of the duplicate except by the evidence of Mrs. Lockyer, who, it must be assumed, if called, would have said that after the will had been executed the testatrix had told her that she had executed the will in duplicate. The objection taken is that this evidence was not admissible, for this reason: you cannot prove the factum of the execution of a will, according to the Wills Act, by hearsay evidence—by a statement of the testatrix

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herself that she had executed the will. I am clearly of opinion that this objection is well founded. I am not going into the question of the admissibility of statements of a testator prior to the execution of his will as to his intentions, or of statements made by him after the execution of a will as to its contents; but there is a series of authorities beginning with *Doe* v. *Palmer* (1), which was decided by Lord Campbell C.J. in 1851, and was acted upon by Sir Cresswell Cresswell in *In the Goods of Ripley* (2), which latter case was cited and approved by the Court of Appeal in *Sugden* v. *Lord St. Leonards.* (3)

How is it possible, in the face of these authorities, which established that the execution of a will cannot be proved by hearsay, without a single case which casts doubt upon the law as so laid down, now to say that the factum of the execution of a will can be proved by hearsay evidence? In my judgment the proposed evidence was not admissible, and it was rightly rejected by the learned judge. Therefore the motion for a new trial must be refused.

Application refused.

Solicitors: *C. T. Wilkinson, for Timbrell & Wilkinson, Stratford; A. Hunt, for Browne & Rooke, Westerham.*

(1) 16 Q. B. 747. (2) 1 Sw. & Tr. 68.

(3) 1 P. D. 154.

W. L. C.

[DIVISIONAL COURT.]

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THE PARKDALE.

Admiralty—Wages—Desertion—Forfeiture—Deductions—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 232—*Gratuities to Master.*

In taking the accounts in an action in rem, in a county court, for wages and disbursements, the master was allowed to deduct, as against the Exchequer, from wages forfeited by desertion, the sum of 116*l.* for clothing supplied to the seamen, prior to their desertion, out of the slop chest kept by the master with the knowledge of the owners. He was also allowed to retain a sum of 45*l.*, being the total of three gratuities paid by consignees of cargo to him, and not credited to the ship. On appeal by the owners:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of the county court judge, first: that the "wages forfeited for desertion," which are to be paid into the Exchequer under s. 232 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), are the wages due after all proper deductions have been made, in which deductions may be included the price of stores supplied by the master to the seamen by way of advance of wages, with the knowledge of the owners, and secondly: that the master was entitled to retain sums given to him by consignees by way of gratuity for the efficient manner in which he had superintended the discharge of cargoes.

Appeal by defendants, the owners of the English barque *Parkdale*, in an action in rem for wages and disbursements, against a decision of the judge of the county court of Cumberland, holden at Whitehaven, in favour of the plaintiff, the master of the vessel.

The action had been referred to the registrar of the county court, assisted by an assessor, to take the account; and the registrar reported that there was due to the plaintiff, as master of the vessel, the sum of 371*l.* 18*s.* 8*d.* for wages, and that he had made disbursements and payments on account of the ship to the amount of 2000*l.* 15*s.* 6*d.*, and had received on behalf of the defendants sums of money amounting to 2177*l.* 2*s.* 3*d.*, leaving a balance due to the plaintiff of 195*l.* 11*s.* 11*d.*

By way of objection to the report, the owners of the vessel contended: first, that the master could not be allowed, as against the Exchequer, to deduct from wages forfeited by

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desertion the price of clothing supplied by him to the seamen prior to their desertion; and, secondly, that the master was bound to credit the ship with sums received by him by way of gratuity from consignees of cargo.

With reference to the first point, it appeared from the evidence that in 1894, when the previous master died and the plaintiff was appointed to the command, he took over, with the knowledge of the owners of the vessel, the slop chest, and paid the bill of a clothier in Cardiff for the wearing apparel, &c., it contained. He then supplied, on the three voyages in question, such articles of clothing as the seamen required, and deducted the price from the wages of the seamen, paying them only the balance; but the master was credited in the wages book with the wages as being paid, no statement of the profit made by the master on the slops appearing in the accounts.

On the occasion of a voyage to Santos, and other places, there had been considerable delay owing to yellow fever, and, the crew becoming discontented, some thirty-nine seamen had deserted at different times. Their wages, amounting to 186*l.*, forfeited under the Merchant Shipping Act (1), had been credited to the owners, but the master claimed to deduct, and the registrar allowed, sums amounting to 116*l.* for clothing supplied by him to them prior to their desertion.

With reference to the second point, the accounts shewed that the master had credited his owners with a sum of 6*l.* 14*s.* 3*d.* returned by the stevedore, but the master admitted that he had received from consignees of cargo sums of 10*l.*, 15*l.*, and 20*l.*, making together 45*l.*, and he claimed to retain them as being gratuities paid him for the efficient manner in which he had superintended the discharge.

The learned county court judge affirmed the report on the ground that, as to the first point, "there was evidence before the registrar that the owners knew and sanctioned the supplying

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 232: "(1.) Where any wages .... are under this Act forfeited for desertion from a ship .... those wages shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and subject to that reimbursement shall be paid into the Exchequer and carried to the Consolidated Fund."

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of slops. No question was raised as to the slops supplied being improper slops, not for the owners' advantage as well as the men's. The registrar has treated them as a payment of wages by the captain, as agent for the owners. I cannot say he is wrong in law." As to the second point, the learned judge said "the registrar had a body of evidence before him, both as to the method of doing business between the parties and the general custom of the trade. He has considered this, and I cannot say, ... that his decision is wrong in law. He has found on the facts that the owners knew of the gratuities, and that it was customary to allow them to the master."

On appeal:—

Lauriston Batten, for the appellants (defendants), the owners of the *Parkdale*. The slop chest kept by the master, from which he supplied stores to the seamen, was a private speculation from which he derived a profit, and, like every other shopkeeper, he must bear the loss if his customer goes away without paying. He cannot make the owner of the ship guarantee, or the consolidated fund liable for, the debt due to him by the seamen as, under s. 232 of the Merchant Shipping Act, 1894, the wages forfeited for desertion must be paid into the Exchequer subject only to the expenses caused by the desertion. Assuming that the owners knew of this mode of providing seamen with clothing, &c., the most that the master could be allowed to deduct, in making out the account under s. 132 of the same Act, in the case of the seamen who completed the voyage, would be the net cost of the articles with a moderate percentage by way of profit; but in the case of desertion, the terms of the Act of Parliament are imperative, and no such deduction can be made.

If the master is to be permitted to retain gratuities, there is a tendency for him to suit the convenience of the consignee in a distant port, and be blind to the interests of his employer. The Court always discountenances any payments by way of commissions which lead to a conflict between the duty and the interest of an agent. Here the ship may be reasonably expected to suffer from a system of bribery, as in the discharge of the

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outward cargo, and, in other ways, the consignee, rather than the shipowner, will be studied, if these gratuities go into the pocket of the master instead of being credited to the ship.

Aspinall, Q.C., and *T. E. Mansfield*, for the respondent, the master of the *Parkdale*, were not called upon.

SIR F. H. JEUNE, PRESIDENT. The first point raised on this appeal is as to the so-called deduction with regard to the slops. It appears that certain sailors deserted. Thereupon their wages became forfeited, and the captain claims that what he gave to these seamen in the way of slops should be set against the amount of the wages forfeited, or, in other words, that he should be able to take payment out of the sum which otherwise would be due to the seamen if they had not deserted, and which would be forfeited if they did. The case appears to me to be of the simplest possible kind. The captain is entitled to pay wages—nay, more, he is personally bound to the seamen for their wages. He is entitled, beyond all question, within the limits of the Act, to make advances. If he is entitled to make advances, I can see no difference in his giving them slops to the value of such advances as he might have made, and all the more because when he comes ashore the captain is obliged to produce accounts, and an opportunity is given to the sailor of checking them in the presence of the proper officer. Consequently, he can make advances in this way to the seamen, and that is what in this case he has done. I can see no reason why he should not. If it could be pointed out that the Act forbade anything of the kind, it would have made all the difference; but so far from doing that, it seems to me that the Act distinctly recognises transactions of the kind. Sect. 132 provides for the form to be used, and the form actually speaks of wages advanced and of stores supplied, it being common knowledge that the stores are supplied in this way by the captain. Therefore, it appears to me impossible to say that the Act prevents transactions of this kind; and as the owners knew all about it, they cannot properly make any objection.

Then arises the question whether, if the deduction could be made in the ordinary course, when a seaman claims the balance

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of his wages, the forfeiture makes any difference? I do not think it does. Sect. 232 provides as to this forfeiture. [The learned judge read the material part of the section already set out, and continued:—]

All that that section provides is that the wages are to be forfeited. But what are the wages? They are, I think, the sum due after all proper deductions have been made. I do not mean deductions in the sense of penalties, but in the ordinary sense of the word. It appears to me to be perfectly legitimate to make deductions which the law allows for wages advanced, or for stores supplied, which, to my mind, would have exactly the same effect. Therefore, I have no doubt but that the captain in this case only did what is usual, and what the owners knew of, and the law allows.

The other point is as to gratuities; and I find it difficult to see how any argument can possibly be raised on that. We have the evidence of the captain as to what the exact nature of these gratuities was, and he drew what I think was a proper distinction. As regards the sum returned to him by the stevedore, that he gave credit for to his owners, properly enough, because that really amounted to a rebate, and anything connected with the payments made for the owners should naturally be carried to their credit. But I regard the gratuities as simply presents given by the merchant to the captain for doing his duty both to the merchant and his owners, and doing it extra well. I see a broad distinction between that and anything in the nature of secret commission; and I therefore think the owners are not entitled to have these gratuities taken into their account.

GORELL BARNES J. There are only two points for decision in this case, namely, whether or not the master, who is the plaintiff, is to lose the amount of the value of the slops which were advanced to sailors on account of their wages; and, secondly, whether the master is entitled to some small sums, in the shape of certain gratuities which appear to have been paid to him.

The first point arises in this way. The master, as everybody

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knows, and as every witness seems to have known in this case, has in the course of the voyage to provide the sailors with clothing, boots, and so forth, otherwise called slops, because it is common experience that these men go to sea so improvidently that they have not adequate things to wear to work the ship, especially in cold latitudes. The master, in starting, becomes responsible by the articles to the crew for their wages. He provides certain clothing and articles of use to them in the course of the voyage, and forms are provided by the Board of Trade for him to insert, on return to port, the exact amount of money given to the men on account of wages, and the amount of slops or stores he has provided them with, and which they have taken as payment in lieu of wages. When the master comes back, and pays off the crew in the presence of the superintendent, even when he does so with the assistance of a clerk or other person from the office of the shipbroker or shipowner, he deducts from the amount payable as wages the amount properly advanced in respect of these matters.

That being the ordinary course of business, it is now argued that because some men deserted after they had earned wages, and have therefore legally forfeited what is their due, that the master, who, as the evidence shews, was acting with the full knowledge of his owners, is not to charge the owners in the account of wages with the amount of wages which is equivalent to the value of the slops supplied to the men who deserted. It seems to me beyond all question, when the Act of Parliament, the articles, and the forms are all looked at, especially when the course of business is considered, that the point taken on behalf of the owners is quite untenable.

The other point is that the master has improperly retained some small gratuities, and it is argued that these gratuities are in the nature of secret commissions. Of course, no master or other agent is allowed to take any secret commission, the reason being that in so doing he is acting antagonistically to the interests of his employers, and taking a benefit which, if allowed, would be against their interests; but in this case the master has done no more than receive a little present, not in any sense antagonistic to his owners, but simply because the consignees

thought that he had discharged the cargo so well that he was entitled to a small sum. This is one of the commonest forms of gratuity which exist, and which, when given under such circumstances, the master is entitled to accept.

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Appeal dismissed.

Solicitors for appellants, the owners of the *Parkdale*: *Day, Russell & Brougham, for Charles A. M. Lightbound, Liverpool.*

Solicitors for respondent, the master of the *Parkdale*: *Collins & Turney, Whitehaven.*

T. L. M.

THE JANET COURT.

1897 Jan. 22.

Admiralty—Salvage—Derelict—Principles of Assessment of Award.

Although there is no rule entitling the salvors of a derelict vessel, as of right, to a moiety, or other specific proportion, of the value of the property salved, and the reward is to be assessed upon the same principles as in other cases of salvage, still there are usually present, in the case of a derelict, at least three special elements which tend to enhance the award, namely, the high degree of danger to which the property to be salved is exposed, the difficulty of approaching the derelict vessel without any aid in boarding her, and the necessity, when taking her in tow, of supplying men to steer her, thereby exposing some of the salvors to additional risk, and rendering the salving vessel short-handed.

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the *Anerley*. The defendants were the owners of the *Janet Court*, her cargo and freight.

The case is reported only as to the principles upon which the reward to salvors is assessed in cases of derelict.

The material facts were as follows:—

On March 8, 1896, the *Anerley*—a screw steamship of 1199 tons net register, with engines of 160 horse-power nominal, and a crew of twenty-three hands all told, from Philadelphia to St. Thomas with coals—was in the Atlantic, in lat. 31° 50′ N. long. 70° 40′ W., not far from the Bermudas, the weather at the time being stormy, when a dismasted vessel was made out

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some four or five miles distant, ahead. On coming up with her, she was found to be lying in the trough of the sea, drifting before the wind and constituting a serious danger to navigation. The whistle was blown to attract the attention of any one who might be on board; but as no one appeared (the crew having been taken off two days before by another vessel), and darkness was coming on, it was deemed imprudent to attempt to board her then. The *Anerley*, therefore, lay by her until the morning, when, the wind and sea having somewhat moderated, the chief and second mate, the boatswain, and three A.B.s were sent to her in the life-boat. They succeeded in boarding her, and found her to be an iron barque, the *Janet Court* of Glasgow, of 966 tons register, laden with 9591 bags of nitrate of soda for New York. All her three masts were gone, and these in falling had damaged the bulwarks and decks, and there were two holes in the poop-deck which there had been an attempt to cover in with canvas and wood. The pumps were broken, the companion hatch smashed in and roughly covered with canvas. The starboard anchor was in the water with twenty to thirty fathoms cable out. The only boat on board was stove in. One of the hatches had been taken off each hatchway apparently with the object of allowing the ship to founder. The hull appeared to be tight, and her steering-gear in order, but there were fourteen inches of water in the well. With great difficulty, and after sending most of the crew of the *Anerley* on board, 120 fathoms of hawser were payed out from the *Anerley* to the *Janet Court*, and shackled on to the port cable of that vessel, the starboard cable with the anchor attached being slipped.

The mate, boatswain, and two A.B.s were then left on board the *Janet Court*, and about 10 A.M. on March 9 the towage commenced towards St. Thomas, distant about 850 miles, the master of the *Anerley* deeming it better to make for that port than attempt to reach Bermuda, or the American coast. Owing to high wind and heavy seas the speed had to be eased from time to time; but about 11 A.M. on March 16, the *Janet Court* was anchored in the harbour in safety. The services performed by the *Anerley* lasted eight days, and she was delayed five days longer.

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Extra coal and stores were consumed, the engines were strained, some expenses incurred whilst communicating with the owners of the *Janet Court*, in order to ascertain what was to be done with the vessel, and, in the meantime, the mate of the *Anerley* was left in charge of her at St. Thomas. Ultimately her owners abandoned the vessel as a constructive total loss to the underwriters, who sold her as she lay at St. Thomas to the Thames and Mersey Marine Insurance Company, Limited, the insurers of the cargo. She was then sufficiently repaired to be towed to New York and there deliver her cargo, which realized a net sum of 8476*l.* The vessel was also sold there, the net proceeds being 712*l.*; the cost of bringing her to New York from St. Thomas, including expenses incurred at that port, amounted to 2204*l.* For the purposes of the salvage claim, the value of the *Janet Court* and of her cargo was agreed at 7350*l.* The value of the *Anerley* was: ship 15,000*l.*, cargo 1376*l.*, freight 970*l.*, total 17,346*l.*

Aspinall, Q.C., and *F. Laing*, for the plaintiffs. In cases of derelict it was the practice in Admiralty to award the salvors an amount equal to one-half of the salved property: see Kennedy on Salvage, p. 122; and as recently as in *The Watt* (1) Dr. Lushington made a decree to that effect; but, assuming that the salvors are not entitled, as of right, to any specific proportion of the property salved, still the old rule will be borne in mind; and as this was a very meritorious service, well performed, and was the means of saving property to the owners which would otherwise have been totally lost, the remuneration to the salvors should bear a large proportion to the total value of ship and cargo.

Sir Walter Phillimore and *Butler Aspinall*, for the defendants, submitted to the judgment of the Court on the facts alleged by the plaintiffs, but, on the question of the salvors being entitled to any specific proportion of the value of the property, referred to the case of *The True Blue* (2) as being more recent than *The Watt* (1), where Dr. Lushington, delivering

(1) (1843) 2 Wm. Rob. 70. (2) (1866) L. R. 1 P. C. 250.

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the judgment of the Privy Council, and quoting the authority of Lord Stowell in *The Aquila* (1), stated that the alleged rule as to a moiety, in cases of derelict, was not in existence later than the time of Charles II. No doubt the fact of the vessel being derelict is an important ingredient in considering the amount of the award, but the danger to a vessel which is not derelict may be as great as to one which is, so that the matter must be dealt with on the ordinary principles of salvage according to the circumstances of the particular case. Here there was no difficulty in boarding the salved vessel, and the men who remained on her during the towage were not exposed to any additional risk, as there was very little water in her, and, therefore, no immediate danger of foundering.

[Reference was also made to *The Amérique* (2) and *The Livietta*. (3)]

SIR F. H. JEUNE, PRESIDENT. The main element in this case is that the *Janet Court* was a derelict vessel. The fact that the subject of a salvage is a derelict does not now, and I doubt if it ever really did, carry with it a right to remuneration consisting of a half, a third, or any specific proportion of the value of the property salved. There is no magic in the word "derelict"; but the term imports a certain state of things containing elements which tend, on the general principles of salvage, to raise the amount of salvage award, for there are three conditions which a derelict generally fulfils.

The first, and perhaps the most important element to be considered in an award of salvage, is the risk to which the salved ship and her cargo were exposed. This in the case of a derelict is generally high; and in this particular case it is difficult to my mind to imagine circumstances under which the risk to the vessel and her cargo could have been greater. She was abandoned by her crew; she was dismasted, and therefore not easy to be seen by a passing vessel; and more than that, she was left by her crew, one would suppose, with the intention —I do not say that it was in any way wrongful, for they

(1) (1798) 1 C. Rob 37. (2) (1874) L. R. 6 P. C. 468.
(3) (1883) 8 P. D. 24.

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The President.

believed she was in a hopeless condition, and that it was the best thing to be done—she was left by her crew in such a position, with the hatches open, that she probably would before long have foundered. She had already some water in her, and every wave that washed over her added to that and made it more likely that she would founder. The second consideration involved in the case of a derelict is that she has no men on her and has to be approached without such aid as they can afford; and although in calm weather there is no great difference in approaching a derelict as compared with any other vessel, if there is any sea the difficulty is increased, because there is nobody to let down a ladder or throw a rope, or otherwise assist in the attempt to board her from a boat. In the present instance, perhaps, this difficulty was not very great. Then there is another condition which was fulfilled, in this instance, to a considerable extent, because it was necessary to put four men on board her, whose position was not without risk—the Trinity Masters tell me that that risk ought to be considered—and the labour of the remainder of the crew left on their own vessel was, of course, greatly increased.

In this case, therefore, the characteristic elements of a derelict appear to me to be exhibited. But even apart from the consideration of the vessel being derelict, the service was well performed and of considerable merit. The towage lasted eight days, and the delay to the salving vessel is estimated at five days. I do not propose to go into details as to the expenses. It is sufficient to say that there would naturally be some expenses properly incurred in a case of this kind. I do not think it is a case in which the Court would go as high as the moiety sometimes given in such cases, but it is a salvage service for which a substantial award should be given. With the assistance of the Trinity Masters on the nautical questions involved, I have come to the conclusion that the proper award will be the sum of 3000*l.*; and I apportion that amount as follows: 1950*l.* to the owners, 350*l.* to the master, and 700*l.* to the crew according to their rating; but as the Trinity Masters advise me that the mate, boatswain, and two men

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who remained on the *Janet Court* incurred extra risk, I award them double shares.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

C. A.
1897
March 2.

[IN THE COURT OF APPEAL.]

THE JOHN O' SCOTT.

Admiralty—Collision—By-law 20 *of the Regulations of the River Tyne*, 1884.

A collision occurred, in the daytime, about on the line of lights a quarter of a mile outside the pierheads at the entrance to the River Tyne, between the plaintiffs' steamship going out and the defendants' steamship coming in. Gorell Barnes J. held the plaintiffs' steamship alone to blame for bad look-out, but that, having regard to the place of collision, the defendants' steamship had, by coming up from the southward too close to the pierheads, infringed by-law 20 of the Regulations of the River Tyne, 1884, as construed by the Court of Appeal in *The Harvest*, (1886) 11 P. D. 90:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.), that the defendants' steamship had not broken the rule, as it was not a question of actual distance, but whether the incoming vessel gave the other room to pass out in such a way as not to cause danger, and the defendants' steamship had left the plaintiffs' steamship sufficient room to go out and pass to the southward, provided the outgoing vessel had seen the incoming vessel over the pier, and acted as soon as possible.

APPEAL by plaintiffs, the owners of the *W. M. Holby*, against a decision of Gorell Barnes J., finding their vessel alone to blame for a collision with the defendants' vessel, the *John O' Scott.*

The case is reported only on the meaning of the construction put by the Court of Appeal in the case of *The Harvest* (1) upon by-law 20 of the Regulations of the River Tyne, 1884. (2)

(1) 11 P. D. 90.

(2) Code of By-laws for the Regulation of the Port and of the Northumberland and Albert Edward Docks and the River and Docks and Staiths belonging to the Tyne Improvement Commissioners, 1884:—

By-law 20: "Every steam or other vessel (whether towing any other vessel or not, or being towed), shall, unless prevented by stress of weather, be brought into the port to the north of mid-channel, and be taken out of the port to the south of mid-channel."

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The material facts were that:—

On February 25, 1896, about 1 P.M., the weather being fine and clear, the tide just after high water, with a fresh southerly breeze and some swell from the same direction, the *W. M. Holby*—a Swedish steamship of 1040 tons register, with a crew of twenty hands all told, from the Tyne to Oxelösund, in Sweden, in water ballast—was proceeding out of the Tyne a little to the south of mid-channel, heading about E. ½ S., and making from six to seven knots an hour, when, just off the south pier-head, those on board observed, about five to six points on the starboard bow, and about three to four ships' lengths off, the *John O' Scott*—an iron screw steamship of 859 tons gross, and 520 tons net register, with engines of 115 horse-power nominal, a crew of sixteen hands, from London to Shields, in water ballast—heading across the south side of the entrance to the river. The engines of the *W. M. Holby* were stopped and put full speed astern, three blasts of her whistle blown, and the helm put hard a-starboard; but the starboard bow of the *W. M. Holby* came in contact with the port bow of the *John O' Scott*, and both vessels sustained some damage.

Those in charge of the *John O' Scott*, as that vessel was coming up from the southward heading about N. and making three to four knots an hour, observed the masts of the *W. M. Holby* over the south pier, and shortly afterwards saw the hull of the steamship coming out between the piers about five points on their port bow. The engines were stopped, and one short blast of the whistle blown. This was repeated, the engines put full speed astern, and the helm hard-a-ported; but the collision occurred.

Each vessel charged the other with, inter alia, obstructing the fairway by neglecting to comply with the provisions of the above-mentioned 20th by-law.

In giving judgment on June 17, 1896, Gorell Barnes J. said: "The main question to determine, as a matter of fact, is whereabouts the collision took place, because upon that depends nearly everything that arises in the case . . . . The result of the evidence is to satisfy me that . . . . the collision took place about on the line of lights, a quarter of a mile outside the entrance.

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. . . . That being so, one has to consider first whether the *John O' Scott*, which came into collision in that position, was guilty of a breach of the 20th by-law . . . . That rule has been construed in the case of *The Harvest* (1), and Lord Herschell, in the Court of Appeal, said that: 'The true construction is that put upon it by Mr. Justice Butt, that a vessel shall not begin to make for the river, and to shape her course up it too near the piers, but shall keep well out before crossing the line from south to north.' Having found that the vessels were in the position above stated at the moment of collision, I think it is a question of nautical fact for the Elder Brethren to say whether or not that position was too near for the purpose of compliance with the rule; and they are of opinion that the *John O' Scott* came up too close to enter the port properly, having regard to the rule, and to the requirements of vessels coming out of the port." [The learned judge then dealt with the evidence as to the manœuvres of the *W. M. Holby*, as affected by another vessel coming into the harbour, and continued :—]

"It is admitted that those on watch on the *W. M. Holby* did not see the *John O' Scott* until the *W. M. Holby* had cleared the entrance to the piers. . . . I have taken the view as a nautical matter from the Elder Brethren about this, and they say that any vessel coming out of the harbour ought to keep a look-out for all that is to be seen, not merely in the immediate offing of the two piers—straight out between the two piers—but on either side, because those on board the outgoing vessel know, or ought to know, that vessels coming in, especially coming in from the south, must pass over to the north side of the harbour before they can turn in and come up the harbour according to the rule; and their opinion is, and this is a very strong opinion, that as a nautical matter from a seaman's point of view, those on board the *W. M. Holby* ought to have seen the masts of the *John O' Scott*, and ought to have known that she was coming into the harbour, and they advise me that if they had done so there was no difficulty in the *W. M. Holby* keeping over to the southward

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of the entrance, and porting round the buoy which is just outside the south pier and passing under the stern of the *John O' Scott*." The result is "that although the *John O' Scott* was infringing the rule by coming too near, still those in charge of the *W. M. Holby* could, without any difficulty, have avoided the *John O' Scott* in going out of the harbour, and that they ought to have done so . . . . therefore . . . . the *W. M. Holby* is alone to blame for this collision."

The owners of the *W. M. Holby* appealed.

Sir Walter Phillimore, and *Stubbs*, for the appellants (plaintiffs), the owners of the *W. M. Holby*. The Court below has found that those in charge of the *John O' Scott* infringed by-law 20 by coming up from the southward too close to the pierheads. This was the immediate cause of the collision, and, therefore, that vessel is alone to blame in accordance with the decision of this Court in *The Harvest* (1), which is a very similar case, for, though that collision occurred at night, the distance at which the incoming vessel, which was found alone to blame, approached the harbour from the southward, was about the same.

The case made against the *W. M. Holby* in the Court below was that those in charge of her ought to have seen the masts of the *John O' Scott* over the pierheads; but even if they had done so, they would not have been able to tell that she was dangerously close.

If, however, it is to be assumed that when those in charge of the *W. M. Holby* saw the *John O' Scott* doing wrong they had time to get out of her way, then it would be a case of both to blame, for the *John O' Scott*, being too close, should have ported——

[LORD ESHER M.R. But the *John O' Scott* did port her helm, and the *W. M. Holby* instead of porting, starboarded.]

Yes, but the *John O' Scott* should have ported her helm sooner and more than she did, so as to get further out to sea, and avoid hampering the *W. M. Holby*, which vessel, being in ballast, was high out of the water, and would have a difficulty

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in porting sharply round the south pierhead in the face of a strong southerly breeze and swell.

The question as to the necessity of the *John O' Scott* taking proper steps to get out of the way of the *W. M. Holby* was not presented by the learned judge to those who assisted him in the Court below, and they did not therefore apply their minds to this view of the case. The findings that the *John O' Scott* was too close up to the pierheads, and that the *W. M. Holby* could have got out without difficulty, are inconsistent.

Aspinall, *Q.C.*, and *Dawson Miller*, for the respondents (defendants), the owners of the *John O' Scott*, were not called upon.

LORD ESHER M.R. This collision took place at the mouth of the Tyne between a steamship going out of the river and a steamship coming into the river, and the question is whether one or both vessels were to blame.

The Admiralty Court has held that the *W. M. Holby*, which was the ship going out, was solely to blame, but there was a peculiar finding in the case, which was the only difficulty that I could see in it, and that was that the learned judge laid down, on the advice of the Elder Brethren who assisted him, that the incoming vessel, the *John O' Scott*, came too close to the pierhead as she was coming in, and so broke rule 20 of the Regulations of the River Tyne.

Now what is the true meaning of that rule? It was considered in the case of *The Harvest* (1), and the question as to the construction of that rule was to my mind determined in that case. The rule is in general terms, and does not mention half a mile, a quarter of a mile, three-quarters of a mile, or a mile. It does not mention any distance. But, as construed by this Court, it says that the incoming vessel is not to come in "too near." What is the meaning of "too near"? In the case of *The Harvest* (1), I believe the then Lord Chancellor, Lord Herschell, agreed with me, that it is not a hard and fast rule. It is a rule to be used for the purpose of vessels giving each other room to pass in such a way as not to cause danger.

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In that case the interpretation put upon the rule seems to have been this: "She is not to come so near as not to leave room for vessels going out of the river, and if she is coming from the southward before she turns in, she must leave a fairway for all vessels going out of the port." Therefore it is not a rule to be measured with the compasses on the chart. It is a practical rule. The incoming vessel must give room enough. She must not run up so close that you can say she has left just room.

The question I have put to the nautical assessors seems to me to give the true interpretation to the rule. The question is, "Did the *John O' Scott* keep so close to the pierhead as not to leave reasonable room for the *W. M. Holby* to go out of the river and pass to the southward of the *John O' Scott*?" The answer is, "The *John O' Scott* did leave sufficient room for the *W. M. Holby* to go out and pass to the southward, provided the *W. M. Holby* had seen the *John O' Scott* over the pier, and had acted as soon as possible." That seems, according to the true interpretation of the rule, to shew that she did not come up too near, and did leave reasonable room. Therefore, the *John O' Scott* did not break the rule. If she did not break the rule it cannot be pretended that she did anything that was wrong. If she did nothing that was wrong the other ship clearly did what was absolutely wrong, for she kept no proper look-out. She ought to have seen the *John O' Scott* long before she did. Then, before she came through the pierheads, she would have slanted out, and if she had done so she would have had no difficulty, even with the wind and sea as it was, in rounding the buoy and passing to the southward of the other ship. She was therefore wrong both as to her steering and as to her look-out. The other ship did nothing wrong, and consequently it is the *W. M. Holby* which is alone to blame.

LOPES L.J. For some time I felt a difficulty in this case, owing to the opinion expressed by the Trinity Masters in the Court below. They seem to have thought that the *John O' Scott* did not leave sufficient room for a vessel passing out to the southward; and if that had been so it would, to my mind, have

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made a material difference. But now our nautical assessors tell us, after hearing the whole of the evidence read, that in their opinion sufficient room was given, and that if the *W. M. Holby* had had a good look-out, as she was bound to have, she would then have seen the *John O' Scott* on the other side of the pier, and there would have been ample time for her to have passed by the *John O' Scott*. That being so, it disposes of this case, and shews that the *W. M. Holby* is solely to blame.

CHITTY L.J. concurred.

Appeal dismissed.

Solicitors for appellants, the owners of the *W. M. Holby*: *Stokes & Stokes.*

Solicitors for respondents, the owners of the *John O' Scott*: *Thomas Cooper & Co.*

T. L. M.

1896 *Dec.* 19.

[IN THE CONSISTORY COURT OF ROCHESTER.]

THE VICAR OF RICHMOND AND THE CHAPELWARDENS OF ST. MATTHIAS, RICHMOND; THE CHURCHWARDENS OF RICHMOND, AND RUBE AND WIFE INTERVENING *v.* ALL PERSONS HAVING INTEREST, &c.

Ecclesiastical Law—Faculty—Discretion—Refusal of Faculty—Chancel Screen Gates—Figures on Chancel Screen representing Our Lord upon the Cross, the Virgin Mary, and St. John—Evidence—The Church Building Act, 1845 (8 *&* 9 *Vict. c.* 70), *s.* 7—*Select Vestry—Effect of Resolution of Meeting of Pew-Renters of Parochial Chapel of Ease.*

A petition by the vicar and churchwardens of the parish church of R., and the chapelwardens of a chapel of ease in the parish of R., asking for a faculty to authorize the erection in the chapel of a chancel screen with gates, and with a crucifix and figures of the Virgin Mary and St. John placed on the top of the screen, was supported by a resolution of a meeting of the pew-renters of the chapel. The vestry for ecclesiastical purposes of the parochial area in which both the parish church and the chapel of ease were situate, was a select vestry of the whole civil parish of R., which comprised a larger area than the parochial area above mentioned, and

the vestry had passed no resolution either in favour of or against the grant of the faculty:—

Held,

(i.) That a resolution of the select vestry might be dispensed with.

(ii.) That a faculty for chancel screen gates ought not to be granted.

(iii.) That a faculty for a crucifix with or without figures on either side placed on a chancel screen ought not to be granted.

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VICAR OF RICHMOND AND CHAPELWARDENS OF ST. MATTHIAS, RICHMOND *v.* ALL PERSONS HAVING INTEREST, &c.

THIS was a cause of faculty instituted on behalf of the Rev. Charles Tickell Procter, vicar of the parish of Richmond, in the county of Surrey (1), and honorary canon of Rochester, and George Ernest Steward and Augustus Mourant Handley, chapelwardens of the chapel of ease of St. Matthias, Richmond, for the purpose of obtaining a faculty for the erection in the chapel of ease of a screen at the entrance of the chancel and extending across the whole breadth thereof; the said screen to be of oak throughout and in accordance with a design and elevation shewn on a drawing and section annexed to the petition to lead the faculty. From this drawing and section it appeared that it was proposed that the screen should be fitted with gates three feet high, and that there should be on the top of the screen in the centre, above the gates, a crucifix with a figure of the Saviour four feet high, and on one side thereof a figure of the Virgin Mary three feet six inches high, and on the other side thereof a figure of St. John also three feet six inches high. The petition stated that, at a meeting of

(1) Previously to the coming into operation of 9 Geo. 3, c. lxv., there were annexed to the vicarage of Kingston, Surrey, five chapelries—Thames Ditton, East Molesey, Petersham, Kew, and Sheen otherwise Richmond; but by that Act (passed in 1769) the vicarage of Kingston and chapelry of Richmond, including the hamlets of Ham and Hook, were after the next avoidances thereof created a separate and distinct vicarage by the name of Kingston-upon-Thames with Sheen otherwise Richmond; Petersham and Kew being also formed into a separate and distinct vicarage, and Thames Ditton and East Molesey into perpetual curacies. In 1849 another Act relating to ecclesiastical affairs at Richmond was passed, and by that Act (12 & 13 Vict. c. xlii.), on the decease of the then vicar of Kingston-upon-Thames and Sheen otherwise Richmond, or on his resignation of the vicarage as far as it related to Richmond, the parish of Richmond was to be made into a distinct and separate vicarage, to be called the vicarage of Richmond. This change duly took place in 1852. As to the subsequent division of the vicarage of Kew and Petersham into two distinct vicarages, see 13 & 14 Vict. c. xvi.

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the seat-holders of the chapel of ease, held July 16, 1896, the following resolution was passed unanimously: "That this meeting having heard full details and explanations from the vicar and churchwardens [chapelwardens], and having considered the design of the proposed chancel screen submitted to it, hereby approves the said screen, and commends it to the favourable consideration of the Court with a view to a faculty for it being granted."

The citation with intimation in the suit was issued on August 10, 1896, and was duly served (1), but no appearance was entered for any opponent.

The suit now came on for hearing before the Chancellor of the diocese of Rochester (Lewis Tonna Dibdin, Esq.), together with a motion on behalf of Augustus Charles Sadler and John Wicher Brooking, the churchwardens of the parish church of Richmond, and of Charles Ernest Rube and Kate Rube, his wife (the donors of the screen), for leave to be added as interveners or petitioners in the suit praying for the grant of the faculty.

It appeared by affidavits brought in in support of the petition that in or about the year 1785 a select vestry was appointed to control the affairs of the parish of Richmond as then defined in the place of the ancient open vestry of the parish; thirty-one vestrymen having under the Act creating the vestry (2) to be elected by the inhabitants of the parish of Richmond; that subsequently four separate parishes had been carved out of the last-mentioned parish, each with its separate and distinct district vicarage, church, and incumbent, there thus being at the date of the affidavits five parishes where formerly there had been the old parish of Richmond alone—namely, the parish of St. Mary Magdalene (the old parish church of Richmond); the parish of St. John the Divine, defined or created in 1838 (3); of Holy Trinity, defined or created in 1870; of St.

(1) The citation was served by the original being affixed for some time on the outer doors of both the parish church of Richmond (St. Mary Magdalene) and of the chapel of ease, and by duplicate copies of the same being left affixed in the place of the original.

(2) 25 Geo. 3, c. xli.

(3) As to this chapel, see 12 & 13 Vict. c. xlii., s. 1, and an Order in Council of November 29, 1838.

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Luke, defined or created in 1890; and of Christ Church, defined or created in 1894: that the select vestry consisted of vestrymen elected by all the inhabitants of the above-mentioned five parishes; none of the said vestrymen being of necessity inhabitants or ratepayers in the old parish of Richmond, and there being nothing in the constitution of the select vestry to prevent the whole thirty-one vestrymen being selected from the four parishes other than the parish of St. Mary Magdalene, i.e., that portion of the old parish of Richmond of which St. Mary Magdalene was still the parish church; and that by reason of the premises a resolution of the select vestry would not properly represent the wishes of the parish of Richmond, of the parish church of which St. Matthias was merely a chapel of ease, governed by the Church Building Act, 1845, s. 7 (1), its site having been conveyed to the Ecclesiastical Commissioners under 58 Geo. 3, c. 45, s. 33, before its consecration in 1858.

Harold Hardy, on behalf of the petitioners and in support of the motion on behalf of the interveners. The churchwardens of the mother church of Richmond, on which St. Matthias is

(1) The Church Building Act, 1845, s. 7, provides (inter alia) as follows: ". . . . in all cases not otherwise expressly provided for, two fit and proper persons shall be annually appointed churchwardens for any new church (without a district) already built or hereafter to be built upon a site whereof Her Majesty's said commissioners [the Ecclesiastical Commissioners] shall have accepted the conveyance under the provisions of the hereinbefore recited Acts; and the first appointment of such persons shall take place within two calendar months after the passing of this Act with respect to a church already built and consecrated, and within two months after the consecration of a church to be so hereafter built; and the next appointment of such persons, in either of such cases, shall take place at the next usual period of appointing parish officers; and in each such case one of such persons shall be chosen by the minister of such church, and the other by the renters of pews therein, or by the majority thereof, at any meeting to be summoned, in all respects as the minister of such church, or (if there shall be no minister) as the churchwardens going out of office shall direct, and the two persons when so appointed and elected churchwardens shall appear and be admitted according to law . . . . and shall also do, perform, and execute all lawful acts, matters, and things necessary for and concerning the management, good order, and decency of behaviour to be kept and observed in such church by the congregation thereof. . . ."

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dependent as a parochial chapel of ease without a district, have a right to intervene in the suit; as also have Mr. and Mrs. Rube, who are both resident parishioners in that portion of the old parish of Richmond in which St. Matthias is situate. They all have a sufficient interest in the subject-matter of the proposed faculty.

[THE CHANCELLOR. The churchwardens of Richmond and Mr. and Mrs. Rube can be added as co-petitioners, and the petition may be amended accordingly.]

The Court should not consider it a ground for refusing the faculty that the select vestry of Richmond has not passed a resolution in favour of the erection of the proposed screen. The opinion of the select vestry would in no sense be representative of the opinion of those interested, and by far greater weight ought to be given to the opinion of the congregation who attend the services at St. Matthias chapel, and are the only parishioners really affected by what it is proposed to do: *Peek* v. *Trower*. (1)

Chancel screens with gates have never been held to be illegal. The case of *Bradford* v. *Fry* (2) is not to be construed as laying down any general rule. Indeed, since that decision, several cases in the Diocesan Courts have sanctioned the erection of chancel screen gates where it could be shewn that they were required for protection of property in the chancel: *In re St. Agnes, Toxteth Park* (3); *Re The Church of St. John, Isle of Dogs* (4); *The Vicar and Churchwardens of St. James, Norland* v. *The Parishioners of the Same* (5); *The Vicar and Churchwardens of St. Peter's, Eaton Square* v. *The Parishioners of the Same* (6); *The Vicar and Churchwardens of St. John, Timberhill* v. *The Rectors, &c., of the Same*. (7)

It cannot rightly be concluded since the decision of the Privy

(1) (1881) 7 P. D. 21.
(2) (1878) 4 P. D. 93.
(3) (1885) 11 P. D. 1.
(4) (1888) Tristram Consistory Judgments, p. 67.
(5) [1894] P. 256.
(6) [1894] P. 350.
(7) [1895] P. 71. See contra, *Beal* v. *Liddell*, (1855) Moore's Special Report, 77; *In re St. Augustine, Haggerstone*, (1877) 4 P. D. 111, n.; *In re The Church of the Annunciation, Chislehurst*, (1877) 4 P. D. 111, n.; *Re St. Margaret, Lee, Record* Newspaper, October 21, 1887; *In re St. Andrew, Romford*, [1894] P. 220.

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Council in *Phillpotts* v. *Boyd* (1), that the crucifix and figures proposed to be placed on the chancel screen in this case are per se illegal, independently of the surrounding circumstances of the chapel where they are intended to be erected. That decision laid down a test of legality referred to and acted upon by Lindley L.J. in *Reg.* v. *The Bishop of London* (2), and applicable both to the crucifix and the other figures here, namely, that such erections are only illegal if there is a probability of their being abused by superstitious reverence being paid to them. Here there is no such probability. The crucifix and figures are merely architectural decorations, and it could be shewn by evidence that there is nothing in connection with the services or management of the church such as led to the refusal of the faculties for the retention of the crucifix on the chancel screen in *Ridsdale* v. *Clifton* (3), or the crucifix and figures in the case of *The Vicar and Churchwardens of St. John, Timberhill* v. *The Rectors, &c., of the Same.* (4) This is like the later case of *The Rector and Churchwarden of Barsham* v. *The Parishioners of the Same* (5), where the faculty asked for was granted. [He also referred to *The Vicar and Churchwardens of St. John, Pendlebury* v. *The Parishioners of the Same.* (6)]

THE CHANCELLOR. This is an application by (amongst other persons) the vicar of Richmond, the churchwardens of that parish, and the chapelwardens of the chapel of ease of St. Matthias in the parish, for a faculty to authorize the erection of a chancel screen in this chapel according to a plan which shews that there are to be gates three feet high to close the approach to the chancel, and that on the top of the screen there is to be a rood or crucifix with a figure of the Saviour four feet high flanked by figures of St. Mary and St. John each three feet six inches high. The application is supported by a vote of a meeting of pew-renters, who it is suggested have more or less the position of a vestry under the Church Building Act, 1845, s. 7; and the site of this chapel has been accepted by the

(1) (1875) L. R. 6 P. C. 435.
(2) (1889) 24 Q. B. D. 213, 237.
(3) (1877) 2 P. D. 276.
(4) [1895] P. 71.
(5) [1896] P. 256.
(6) [1895] P. 178.

1896

VICAR OF RICHMOND AND CHAPEL-WARDENS OF ST. MATTHIAS, RICHMOND v. ALL PERSONS HAVING INTEREST, &c.

The Chancellor.

Ecclesiastical Commissioners so as to bring the chapel within that section. There is no resolution by the parish vestry of Richmond. This vestry is a select vestry constituted under a local Act (25 Geo. 3, c. xli.), which abolished the old open vestry. The civil parish of Richmond has been divided into several ecclesiastical districts, so that the parochial area now in connection with the old parish church and this chapel of ease is very much less than the area the inhabitants of which choose the vestry. It is said that the views of the select vestry of the whole civil parish are no test of the opinion of the ecclesiastical parish now in contact with the parish church, and that it is only the views of the people living in this ecclesiastical parish with which I ought to concern myself, because inhabitants of severed districts have their own churches, and have no right to interfere with the old parish church, which is no longer their parish church. There seems a good deal of force in that contention, and, without attempting to lay down any general rule applicable to all cases of this sort, which within the metropolitan area are not infrequent, I think I am justified in this case in not requiring a resolution of the Richmond vestry. But I do not see my way to grant this faculty as asked. As to the screen, there is no difficulty, and if the petitioners wish to take a faculty for that alone without the gates or the rood they may do so. I do not propose to discuss either of these vexed questions on its merits. I have listened to Mr. Hardy's arguments, and I have read the various conflicting cases in different Consistory Courts. But it seems to me, as I have already held in previous cases more than once, that if such a faculty as that asked for is to be obtained the parties must invoke a higher court. With regard to chancel gates, I think I am bound by the decision of the Court of Arches in *Bradford* v. *Fry* (1), adopting Dr. Lushington's observations in *Beal* v. *Liddell*. (2) With regard to the rood, I think I am bound by the decision of the Judicial Committee of the Privy Council in *Ridsdale* v. *Clifton* (3), adopting the reasoning of the Dean of the Arches in the case of *Clifton*

(1) 4 P. D. 93. (2) (1855) Special Report by Moore, p. 77.
(3) 2 P. D. 276, at pp. 349–353.

1896

VICAR OF RICHMOND AND CHAPEL-WARDENS OF ST. MATTHIAS, RICHMOND *v.* ALL PERSONS HAVING INTEREST, &c.

The Chancellor.

v. *Ridsdale*. (1) I understand that case to have decided that a crucifix with or without figures placed on the top of a chancel screen cannot, on account of its special history and significance in that position, be regarded as a mere architectural decoration, as it might perhaps be in some other position, as, e.g., in a reredos; and that faculties for crucifixes with or without figures so placed ought not to be granted. I do not think the question can turn on such matters as the presence or absence of candles on the screen, the existence of a rood loft as well as the rood and rood beam, or the presence or absence of other decorations or ornaments forbidden by law, such as the "Stations of the Cross." No doubt details of this kind are mentioned in the cases as assisting the conclusion arrived at; but the main ground of decision has been, I think, what I have indicated. If that is to be departed from, it must be by the tribunal which laid down the law in *Ridsdale* v. *Clifton* (2), and I can only follow that case as I understand it. (3)

Solicitors for petitioners: *Brooks, Jenkins & Co.*

C. F. J.

BONSOR *v.* BONSOR.

1897

Jan. 25; *Feb.* 1.

Divorce—Permanent Maintenance—Income of Respondent—Voluntary Allowance to Husband—Practice.

Where in a suit for dissolution of marriage or for judicial separation there has been a full inquiry into the husband's means upon an application for alimony pendente lite, the amount of permanent alimony or permanent maintenance to be allotted to the wife will be determined upon the evidence then given, without a repetition of such inquiry upon the petition for permanent alimony or maintenance.

For the purpose of determining the amount of permanent alimony or maintenance, recourse may be had to income of which the husband has no legal power to enforce the payment.

A husband, who was largely indebted to his brother, was in receipt of a

(1) (1876) 1 P. D. 316, at pp. 349–359.

(2) 2 P. D. 276, at pp. 349–353.

(3) An appeal against this decision was asserted to the Court of Arches, but was abandoned after the inhibition had been taken out.

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BONSOR v. BONSOR.

voluntary allowance from him so long as he should remain out of the country:—

Held, that the voluntary allowance was properly included in the husband's income for the purpose of fixing the amount of permanent maintenance.

MOTION by the wife, the petitioner, to vary, or, in the alternative, to confirm the report of the registrar upon her petition for permanent maintenance.

The petitioner had during the progress of her suit for a divorce filed a petition for alimony pendente lite, and, after a full investigation of the respondent's means, the registrar had made an order for alimony pendente lite at the rate of 150*l.* per annum. The evidence shewed that the respondent's only means were an allowance of 60*l.* a month so long as he resided out of the country, made to him by a brother to whom he owed 18,000*l.*, and that he owed a further sum of 1700*l.* to other creditors.

After the decree absolute had been pronounced, the petitioner filed a petition for permanent maintenance; no further evidence was taken, and the registrar submitted in his report that permanent maintenance should be allotted at the rate of 15*l.* a month.

C. J. Willock, for the petitioner. No alteration in the respondent's income since the order for alimony pendente lite having been shewn, permanent maintenance should be awarded upon the same income upon which alimony pendente lite was allotted: *Franks* v. *Franks* (1); *Greenwood* v. *Greenwood*. (2) The registrar has found that the respondent is in receipt of an allowance of 60*l.* a month from his brother, and the petitioner is entitled to permanent maintenance at the rate of one-third, or 20*l.* a month.

Barnard, for the respondent. The registrar's finding upon the application for alimony pendente lite is not binding upon the respondent when a petition is filed for permanent maintenance. Although, where there is a decree for judicial separation only, there need be no separate inquiry upon a petition for permanent alimony when alimony pendente lite has been

(1) (1861) 31 L. J. (P. & M.) 25. (2) (1862) 32 L. J. (P. & M.) 136.

allotted, yet, where there has been a decree of dissolution of marriage and permanent maintenance is sought, there should be a separate inquiry into the husband's means. Upon the registrar's report, it is apparent that the petitioner is not entitled to anything in respect of permanent maintenance. The respondent owes his brother 18,000*l.* and other creditors 1700*l.*, and his brother makes him a voluntary allowance of 60*l.* a month. The submission of the registrar amounts to saying that the brother should be ordered to make this allowance to the petitioner. A purely voluntary allowance cannot be taken into consideration in determining the amount of the husband's income liable to contribute to permanent alimony or permanent maintenance: *Haviland* v. *Haviland*. (1) The registrar's report ought not to be confirmed.

Willock, in reply. In *Clinton* v. *Clinton* (2) a rent-charge, the trustees of which had a discretion to refuse payment, was taken into account in estimating the husband's income, and sequestration was ordered to issue in order to enforce an order for permanent alimony. There is nothing to prevent the allowance from the respondent's brother being treated as part of his income for the purposes of the present application. [He also cited *Malo* v. *Malo*. (3)]

Cur. adv. vult.

Feb. 1. SIR F. H. JEUNE, PRESIDENT. In this case there was a decree for dissolution on the petition of the wife, and on an application for permanent maintenance the learned registrar has reported: "The respondent has no means and is indebted to his brother in the sum of about 18,000*l.*, who nevertheless allows the respondent the sum of 60*l.* a month as long as he resides out of this country; the respondent is also indebted to other persons in various sums amounting together to about 1700*l.*"; and the registrar has submitted that the respondent should be ordered to pay to the petitioner the sum of 15*l.* a month.

On a previous application for alimony pendente lite accounts

(1) (1863) 3 Sw. & Tr. 114. (2) (1866) L. R. 1 P. & M. 215.
(3) (1786) 2 Sw. & Tr. 657, n.

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The President.

were gone into, affidavits filed, and the respondent was cross-examined. There was practically no additional evidence on the application for permanent maintenance, but the registrar proceeded on the evidence given before him on the application for alimony pendente lite. This was in accordance with the practice, and I think quite right. There are authorities which seem to go as far as to shew that if alimony pendente lite has been awarded, no evidence can be given on the application for permanent alimony except to shew alteration in the husband's means: see *Franks* v. *Franks* (1) and *Greenwood* v. *Greenwood*. (2) It certainly is the practice that when alimony pendente lite has been fixed, not by consent, but after a full inquiry, the facts so elicited constitute the grounds on which the amount of permanent alimony, or permanent maintenance, should be determined.

The learned registrar has arrived at the sum of 15*l*. a month by taking one-third of the husband's income of 60*l*. a month and making a deduction in respect of the debt of 1700*l*. This on an application for permanent maintenance is, I think, a correct conclusion.

But it was argued before me that the husband's income of 60*l*. a month is a voluntary allowance from his brother, and that, therefore, it ought not to be taken into account in fixing alimony, and reliance was placed on the case of *Haviland* v. *Haviland*. (3) I reserved judgment because I wished to ascertain whether since the date of that case incomes, to which the recipients have no legal claim, have been excluded. I am informed that they have not; on the contrary, they have in many instances been taken into calculation. Not only do I think that this should be so, but I can easily understand why *Haviland* v. *Haviland* (3) has not been considered to forbid such a practice. It will be observed that in that case all that the learned judge said was: "It seems to me that I ought not to allot alimony in respect of the voluntary allowance made by the husband's mother in this case, but I do not mean to say that cases may not arise in which alimony may properly be awarded

(1) 31 L. J. (P. & M.) 25. (2) 32 L. J. (P. & M.) 136.
(3) 3 Sw. & Tr. 114.

in respect of an annual income to which the husband has no strictly legal right." Accordingly, in the case of *Clinton* v. *Clinton* (1), the Court ordered, and enforced, a payment of permanent alimony, where the sole income of the husband consisted of a rent-charge, with regard to the payment of which trustees had an absolute discretion; and later, in the case of *Moss* v. *Moss and Bush* (2), the Court ordered alimony pendente lite, though the husband's only income consisted of a voluntary allowance from his father, which had in fact been stopped since the commencement of the suit.

It appears to me that if once it be conceded that recourse may be had to incomes of which the recipient has no legal power to enforce the payment, it is impossible to draw any distinction in principle between one or another kind of such incomes. Nor can I see any reason why a wife on separation or divorce from her husband should not, in a proper case, have a share of any kind of income, in the whole of which she could have participated as his wife. Injustice to the husband is prevented by the provisions in the Act which allow the maintenance to be reduced or suspended, if his means of paying it fail. The report of the registrar will therefore be confirmed with costs.

Solicitors for petitioner: *Lewis & Lewis.*
Solicitors for respondent: *Marshall & Marshall.*

(1) L. R. 1 P. & M. 215. (2) (1867) 15 W. R. 532.

W. J. B.

1897
Feb. 18.

In the Goods of SUAREZ.

Probate—Grant of Administration—Limited Administration—Person entitled to Grant abroad—Immediate Grant necessary—Grant to Stranger—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

At the time of the death of an intestate his next of kin were in the interior of Bolivia, where it took six weeks to communicate with them by telegram, and four months by letter. The Court, being satisfied that an immediate representation was necessary for the preservation of the personal estate, made a general grant to a member of a firm of accountants in London in whose hands the books of the intestate's firm had been placed, limited until such time as the next of kin should apply to take a full grant, and ordered the administrator to give justifying security.

Motion for a grant of limited administration under 20 & 21 Vict. c. 77, s. 73.

Francisco Suarez, who died intestate on February 10, 1897, carried on business in London as an indiarubber merchant. The indiarubber was sent from plantations in the interior of Bolivia, about 3000 miles from the coast, and all the next of kin lived near the plantations, with which there was no mode of communication except by mules; it took six weeks to communicate by telegram with the next of kin, and about four months by letter. Large quantities of goods were lying at Liverpool waiting to be dealt with, and bills accepted by the deceased's firm against the consignments of goods were falling due almost daily, which it would be impossible to honour at maturity unless an administrator of the deceased's estate were appointed. The only relative of the deceased in this country was a nephew, who was on a visit, his permanent residence being in South America, and he was willing that, in order to keep the business going, the grant should be made to Mr. C. Nichols, a member of a firm of chartered accountants, in whose hands the books of the firm had been placed. All parties in this country having business relations with the deceased's firm assented to the application.

Inderwick, Q.C., and *Barnard*, for the motion.

1897

IN THE GOODS OF SUAREZ.

GORELL BARNES J. I think that this is a reasonable application under the circumstances of the case. There will be a general grant to the person suggested, limited until such time as the proper person shall apply to take a full grant of administration; the administrator must give justifying security. (1)

Solicitors: *Goldberg, Langdon, Barrett & Newall.*

W. J. B.

IN THE MATTER OF THE PETITION OF TUCKER.

1897

Feb. 22.

Divorce—Restitution of Conjugal Rights—Substituted Service of Written Demand for Cohabitation—Rules of 1869, *r.* 175.

Where the intended respondent in a suit for restitution of conjugal rights had left the country, and letters addressed to him by his wife at his last known residence and place of business respectively, and containing a written demand for cohabitation, had been returned through his solicitors, who declined to furnish her with her husband's address, the Court allowed substituted service of the demand for cohabitation required by rule 175 to be made on the husband's solicitors.

MOTION on behalf of the intending petitioner in a suit for restitution of conjugal rights to allow substituted service of the written demand for cohabitation required by rule 175 to be made on the intended respondent's solicitors. (2)

It appeared from the affidavits used on the application that on January 30, 1897, the intending petitioner had written and sent to her husband, the intended respondent, by registered post two letters requesting him to receive her home and demanding from him restitution of conjugal rights, one letter

(1) See *In the Goods of Cholwill*, (1866) L. R. 1 P. & M. 192.

(2) By rule 175 of 1869, which relates to suits for restitution of conjugal rights, "The affidavit filed with the petition, as required by rule 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld."

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In re TUCKER.

being addressed to his last known place of residence, the other to his place of business. Six days afterwards the letters were returned unopened through the husband's solicitors to the solicitors for the wife. The husband had left the country, and his solicitors, on being applied to, refused to disclose his whereabouts. The wife was not aware of any other address at which she could communicate with her husband, or of any one through whom she could communicate with him other than his solicitors.

Newson, for the petitioner, cited *Waters* v. *Waters* (1); *O'Sheehy* v. *O'Sheehy* (2); *In re M'Arthur*. (3)

GORELL BARNES J. Sufficient has been shewn to justify an order for substituted service. The written demand required by the rule may be served upon the husband's solicitors.

Solicitors for applicant: *Rose-Innes, Son & Crick.*

(1) (1875) 34 L. T. 33. 1 P. D. 423, sub nom. *Ex parte Sheehy.*
(2) (1876) 34 L. T. 367; S.C.
(3) (1889) 61 L. T. 308.

W. J. B.

SLAYTOR *v.* SLAYTOR AND JACKSON

1897
March 1.

Divorce—Practice—Co-Respondent—Death of alleged Adulterer before Suit—Motion to dispense with making Co-Respondent.

Where, in a petition for dissolution of marriage, adultery is charged with a person who died before the institution of divorce proceedings, the petitioner must apply to the Court for an order to be excused from making him a co-respondent, even though adultery be charged against a second person who has been made a co-respondent to the suit.

APPLICATION for leave to proceed without making one of two alleged adulterers a co-respondent.

The petition alleged that the respondent had committed adultery with one Jackson, who had been made a co-respondent, and against whom a citation had issued in the ordinary course, and also with one Nicholson, who had died before the commencement of the proceedings. An application was made in the registry in the ordinary course to set down the cause for trial, but was refused by the registrar upon the ground that no order had been made by the Court to dispense with making Nicholson a co-respondent. The same view was taken by Gorell Barnes J. upon an application for leave to enter the case in the supplemental defended list.

Marshall Hall, for the petitioner. There is no necessity for a motion to dispense with making a dead man a co-respondent, for he cannot be affected by the decree, and no relief is sought against him. In *Tollemache* v. *Tollemache* (1), where it was held that such an application must be made, there was no known living person with whom adultery was alleged; here there is a living co-respondent, which is sufficient to satisfy the requirements of s. 28 of the Matrimonial Causes Act, 1857. In *Jones* v. *Jones* (2) Gorell Barnes J. says: "I am of opinion that, where the relief sought against the respondent is on the ground of adultery alleged to have been committed with a man,

(1) (1858) 28 L. J. (P. & M.) 2. (2) [1896] P. 165.

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SLAYTOR v. SLAYTOR.

whose name and identity are known, and who is alive, the petitioner must make such person a co-respondent, and that the Court ought not to excuse him from so doing, merely because he finds that he cannot obtain evidence which will prove his case as against such co-respondent." This seems to imply that where the alleged adulterer is dead he need not be made a co-respondent. [He also cited *Hunter* v. *Hunter and Vernon* (1); *Sutton* v. *Sutton and Peacock*. (2)]

Pritchard, for the respondent.

SIR F. H. JEUNE, PRESIDENT. It is clear that where the alleged adulterer has died before the issuing of the citation an application should be made by the petitioner to the Court on special grounds to be excused from making him a co-respondent. I agree with the respondent's counsel that this is a matter of considerable importance; for if such an application were left till the case actually came on for trial, the matter might escape the notice of the Court, or an adjournment might be necessary. The statutory provision which requires that the alleged adulterer should be made a co-respondent, unless the petitioner be excused by the Court from doing so, covers the case of a person who ought to be joined as a co-respondent if he could be so joined. The only question really is at what stage the application is best made. It seems from *Tollemache* v. *Tollemache* (3) that in those days the practice was for the application to be made before the citation was issued; latterly it has been the practice to make it after the issue of the citation and before trial. This difference involves no question of principle, and upon the whole I think that the modern practice is the better; it is desirable that the charge should be formulated in the ordinary way in the petition, rather than that there should be an affidavit filed saying that it had been intended to make charges against the man, had he lived. The proper course is that the citation should issue in the ordinary way, containing however no reference to the alleged adulterer, who should not be named in the

(1) (1858) 28 L. J. (P. & M.) 3. (2) (1863) 32 L. J. (P. & M.) 156.
(3) 28 L. J. (P. & M.) 2.

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SLAYTOR v. SLAYTOR.

title, but only in the body, of the petition; then application should be made for leave to proceed without making him a co-respondent. The proper course has been taken here; and upon satisfactory proof of the death of the alleged adulterer being furnished to the Court an order will be made.

Solicitors for petitioner: *Van Sandau & Co., for Fisher & Co., Doncaster.*

Solicitors for respondent: *Fladgate & Co.*

W. J. B.

GOODWIN *v.* GOODWIN AND ARNOLD

1897

March 8.

Divorce—Practice—Costs—Order for Costs against Co-Respondent—Delay in enforcing Order—Leave to issue Execution.

Where a decree nisi for dissolution of marriage has been made with costs against the co-respondent, and no steps have been taken for upwards of six years to enforce the order for costs, application should be made to the Court for an order that the petitioner be at liberty to issue execution against the co-respondent.

A DECREE NISI for dissolution of the marriage had been made on July 1, 1886, with costs against the co-respondent. At that time the co-respondent had no means whatever of paying the costs, and no steps were taken by the petitioner to enforce the order made against him. The co-respondent had, however, recently become possessed of considerable means, and the bill of costs was, on February 15, 1897, duly taxed, and the registrar's certificate of costs signed. The petitioner now moved for an order that the co-respondent should pay the amount of the taxed costs, and that the petitioner should be at liberty to issue execution for the amount notwithstanding the delay.

Priestley, for the petitioner. Rule 178 provides that on the registrar's certificate of costs being signed he is at once to issue an order of the Court for payment of the amount within seven

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GOODWIN v. GOODWIN.

days, and, the petitioner's right to recover the costs not being barred by any Statute of Limitations, he is entitled, apart from any question of delay, to issue execution. There being no guide in the Divorce Rules as to the course to be taken where there has been a long delay in issuing execution, it is submitted that after six years the leave of the Court should be obtained, as is done in the Queen's Bench and Chancery Divisions under the Rules of the Supreme Court, Order XLII., r. 23, in cases where six years have elapsed since the judgment or date of the order.

SIR F. H. JEUNE, PRESIDENT. I think that the proper course has been taken in applying to the Court for leave to issue execution. The delay has been satisfactorily explained, and I will make the order asked for; considering, however, the lapse of time and the fact that the co-respondent is in a distant country, I think that execution should not be issued for three months, so that he may have an opportunity of appearing, if he should think fit.

Solicitors for petitioner: *Freeman & Bothamley*.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1897
March 24;
April 5.

SAUNDERS *v.* SAUNDERS.

Divorce—Practice—Petition for Divorce—Leave to proceed without Co-Respondent—Discretion of Judge—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Divorce Court Rules*, 1865, *rr.* 4, 6.

The discretion given to the judge, by s. 28 of the Matrimonial Causes Act, 1857, to allow a petition for a divorce to proceed, on special grounds, without making any co-respondent, is to be exercised with regard to the principles laid down in or to be gathered from the Act and the Rules, and to the circumstances of each particular case, and cannot be fettered by any general rule of practice.

The rule laid down in *Jones* v. *Jones*, [1896] P. 165, at p. 170, disapprovedas a rule of general application.

A husband, who had been absent from England for more than two years, ascertained, when he returned home, that his wife had recently given birth to a child, of which he was not the father. She registered the birth of the child, giving her own name as the mother, but without giving the name of any father. She took out a bastardy summons against H., whom she alleged to be the father of the child, but, at the time appointed for its hearing, she did not appear, and the summons was struck out. The husband did not believe that H. was the father of the child, and his solicitor, after making careful inquiry, was unable to obtain any evidence against H. H. was prepared to swear that he had never had intercourse with the wife. The husband presented a divorce petition, in which he alleged that the wife had committed adultery with a man whose name was unknown to him:—

Held, that the husband should be allowed to proceed with the petition without naming any co-respondent.

Decision of Gorell Barnes J. reversed by the Court of Appeal, A. L. Smith L.J. dissenting.

Appeal ex parte by a husband against the refusal of Gorell Barnes J. to allow him to proceed without making any co-respondent to a petition for the dissolution of his marriage on the ground of the alleged adultery of his wife. The petition alleged that the wife had frequently committed adultery with a person whose name was unknown to the petitioner. He filed affidavits which contained statements to the following effect. He left his house in Wales on April 17, 1894, and went to America. He did not return until May 27, 1896, and he then ascertained that his wife had given birth to a child on April 27, 1896. She

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registered the birth of the child as hers, without giving the name of any father. On June 2, 1896, she took out a bastardy summons against one Isaac Harry, as being the father of the child. The summons was made returnable on June 17, 1896. The hearing was adjourned to July 8, 1896, for the attendance of witnesses. On that day she failed to attend in support of the summons, and the justices struck out the case. The wife told the clerk of the husband's solicitor that Harry was the father of the child, and that she had never committed adultery with any one else. Harry denied that he was the father of the child, and was prepared to go into the box and to swear that he had never had intercourse with the wife. It was not disputed that, when he presented his petition, the husband knew where Harry was living.

The husband's solicitor made an affidavit to the effect that he had made careful inquiries, but had been unable to obtain any evidence against Harry.

Gorell Barnes J. based his decision upon the authority of *Jones* v. *Jones*. (1)

J. C. Priestley, for the husband. Leave to proceed without any co-respondent should have been given. It is submitted that the rule laid down in *Jones* v. *Jones* (2) is not a sound one. It is, at any rate, not a rule which applies to every case. In the present case the circumstances were "special" within the meaning of s. 28 (3) of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

(1) [1896] P. 165.

(2) [1896] P. 165, at p. 170.

(3) By s. 27, "It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery . . . . and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded. . . ."

By s. 28, "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless, on special grounds, to be allowed by the Court, he shall be excused from so doing."

By the Divorce Court Rules of December 26, 1865:—

Rule 2: "Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cogni-

The husband cannot honestly allege adultery against Harry. The "alleged adultery" in s. 28 means alleged by the petitioner, and in the present case he does not and cannot honestly allege adultery against any one. If under such circumstances as these he is bound to make Harry a co-respondent, the result will be that any vindictive woman will be able to make a charge of adultery against some man against whom she has a grudge in order to conceal the real adulterer, and thus an innocent man may be harassed, and ultimately the husband would have to pay his costs of the suit. These costs would not be in the discretion of the judge: Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 11. Sect. 28 does not mean that the petitioner must in every case name a co-respondent; it is only the person charged by him who is to be made a co-respondent.

The decisions on the point are somewhat conflicting, but the weight of authority is in favour of the appellant: *Hook* v. *Hook* (1); *Muspratt* v. *Muspratt* (2); *Quicke* v. *Quicke* (3); *Jinkings* v. *Jinkings* (4); *Carryer* v. *Carryer* (5); *Payne* v. *Payne* (6); *Gill* v. *Gill* (7); *Bagot* v. *Bagot* (8); *Cornish* v. *Cornish* (9); *Miles* v. *Miles*. (10) *Jones* v. *Jones* (11) is not binding on this Court, nor indeed are any of the previous cases. It is to the advantage of a husband who petitions for a divorce

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zance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavit shall be filed with the petition."

Rule 4: "Upon a husband filing a petition for dissolution of marriage on the ground of adultery the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct."

Rule 5: "Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit."

Rule 6: "If the names of the alleged adulterers or either of them should be unknown to the petitioner at the time of filing the petition, the same must be supplied as soon as known, and application must be made forthwith to one of the registrars to amend the petition by inserting such name therein, and the registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition."

(1) (1858) 1 Sw. & Tr. 183.
(2) (1861) 31 L. J. (P. & M.) 28.
(3) (1861) 31 L. J. (P. & M.) 28.
(4) (1867) L. R. 1 P. & D. 330.
(5) (1865) 4 Sw. & Tr. 94.
(6) (1888) 60 L. T. (N.S.) 238.
(7) (1889) 60 L. T. (N.S.) 712.
(8) (1890) 62 L. T. (N.S.) 612.
(9) (1890) 15 P. D. 131.
(10) *The Times* of March 20, 1896.
(11) [1896] P. 165.

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to have a co-respondent from whom he can obtain costs, and he is not likely to ask for leave to proceed without one unless he finds it impossible to obtain evidence against any one. Moreover, when an application is made for leave to proceed without a co-respondent, the Court would of course inquire into the reasons for so doing.

Cur. adv. vult.

April 5. LINDLEY L.J. read the following judgment:—This is an appeal from the refusal of Gorell Barnes J. to allow the petition of a husband, who seeks a divorce from his wife on the ground of her adultery, to proceed without making the person who she says committed adultery with her a co-respondent. Before considering the facts, I will state what I conceive to be the legal principles applicable to the case. [The Lord Justice referred to ss. 27 and 28 of the Matrimonial Causes Act, 1857, and to rules 2, 4, 5, and 6, and continued:—]

Now, looking at the Act and the rules, and construing them without assistance from authorities, it appears to me that by "alleged adulterer" in s. 28 and rule 4 is meant alleged by the petitioner in his petition. If the petitioner does not allege any adulterer, s. 28 and rule 4 do not apply to the case. But rule 6 shews that, if the petitioner knows the name of the alleged adulterer, the petitioner must insert his name in the petition; and then, by s. 28 and rule 4, the person so named must be made a co-respondent, unless the judge on special grounds otherwise directs. This, however, raises the question what is meant in rule 6 by the name of the alleged adulterer being unknown to the petitioner. Actual personal knowledge by the petitioner of the adultery charged and of the guilt of an adulterer cannot be expected, and it appears to me absurd to suppose that no name of any adulterer need be stated in the petition unless the petitioner has personal knowledge of his guilt and identity. The expression "unknown" in rule 6 refers to name, and not to guilt, and the expression "alleged adulterer" in rule 6 cannot refer to any person already named in the petition, for the rule only applies where the name of the alleged adulterer is unknown. It seems to me plain that, if a

petitioning husband is in any way informed of the name of any one said to have committed adultery with his wife, he must make up his mind whether he will charge that person with adultery or not. If he decides that he will, he must in his petition allege adultery between his wife and that person, and make him a co-respondent, unless the judge excuses the petitioner from so doing. On the other hand, if the husband decides that he will not charge adultery against the person named to him as guilty of adultery with his wife, whether because he does not believe in the truth of the accusation, or because he is convinced that he cannot prove that person's guilt, or for any other reason, there is a difficulty, for such a case is not very clearly provided for either by the statute or by the rules. The practice in such cases I understand to be, to charge adultery with some person unknown, and to apply to the Court for leave to dispense with a co-respondent upon a special affidavit, stating the information which the petitioner has as to the supposed adulterer, and stating the grounds on which the petitioner asks to be excused from making him a co-respondent: see *Pitt* v. *Pitt* (1); *Tollemache* v. *Tollemache*. (2) This is what the petitioner has done in this case. The Act and the rules, and the practice of the Court based upon them, make it quite plain that in such cases as these it is for the Court, and not for the petitioner, to decide whether a person whose name is known to the petitioner as a person accused of adultery with his wife on the occasion of the adultery being charged against her shall or shall not be made a co-respondent. On the other hand, it is for the petitioner to decide whether damages shall be claimed against a co-respondent or not. (See ss. 33 and 59 of the Act.) What ought to be done about the costs of a co-respondent unwillingly made so by the petitioner, but ordered by the Court to be made a co-respondent as a condition for proceeding with the petition, is a matter for the Court to decide in each particular case. (Sect. 51 of the Act.) The Court must be trusted to do what is right when all the facts are before it. The duty of the judge, in deciding whether the petitioner is to be excused from making co-respondent a person who has been

(1) (1868) L. R. 1 P. & D. 464. (2) (1858) 28 L. J. (P. & M.) 2.

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named to him as an adulterer, is clearly indicated by s. 28 of the Act; and, although confined in its terms to the case where that person is accused by the petitioner, that section has very properly been taken as a guide in other cases, and I gather from the decisions on the subject that special grounds are required to be shewn for not making co-respondents the persons who, as the petitioner is informed, are the delinquents. This practice is quite in accordance with the Act and rules. On all applications to be excused from making a person a co-respondent, whether such a person is charged with adultery in the petition or not, the judge's duty is by no means confined to the consideration of the interests of the petitioner, the respondent, and the other persons implicated. The Matrimonial Causes Act shews plainly enough that the judge's duty is far wider than this. The provisions in it relating to the Queen's Proctor shew that divorce is not regarded as a matter which concerns only husbands and wives and those guilty of adultery. Divorce is regarded as a matter of grave social importance, in which the public are greatly concerned; and the judge, in considering what ought to be done in such cases as that now before us, is bound to protect this public interest, and to do what he can to prevent collusive divorces, and to check all other abuses of divorce proceedings which experience may shew to be likely to occur. This has always been the view taken by the eminent men who have been intrusted with the duty of exercising jurisdiction in divorce cases, and will, I trust, never be lost sight of. The Legislature have purposely refrained from defining or enumerating special circumstances, and to define them beforehand is really to legislate. All that can be said is, that the judge must be guided by the great principles laid down in the Act and rules, or to be gathered from them, and by the circumstances of each particular case as it arises. No doubt cases with common features constantly recur, and the best mode of dealing with them may be learned by experience, and thus become part of the ordinary practice of the Court. But that practice should not be allowed to become a fetter, and should give way at once if circumstances arise which render its observance unjust or inexpedient. I am induced to make these observations because

in *Jones* v. *Jones* (1) a practice which may be conveniently followed in many cases looks as if it were in process of becoming a fetter on the judge. And in this very case we are told that the learned judge acted in accordance with the rule laid down in *Jones* v. *Jones* (1), rather than on an independent consideration of the circumstances of the case itself. It appears to me wrong in principle for any Court or judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises. In *Jones* v. *Jones* (1), which was a case very like the present, Gorell Barnes J. reviewed all the previous cases to be found in the reports. It appears from the last paragraph of his judgment that he was not satisfied that the petitioner there could not obtain evidence of adultery by the person whose name he knew. This was an abundantly sufficient reason for refusing leave to the petitioner to proceed without making that person a co-respondent. But Gorell Barnes J., as I understand his judgment, laid down, and intended to lay down, with the consent of the President, a general rule which he thus expressed: "Where the relief sought against the respondent is on the ground of adultery alleged to have been committed with a man, whose name and identity are known, and who is alive, the petitioner must make such person a co-respondent, and the Court ought not to excuse him from so doing, merely because he finds that he cannot obtain evidence which will prove his case as against such co-respondent." If I understand this passage correctly, it means that, if a husband seeks a divorce from his wife on the ground of adultery, and he knows the name of a person who he is informed was her paramour, the petitioner must make that person a co-respondent, although he is convinced that he cannot obtain evidence to prove the man's guilt, and although he adduces satisfactory evidence that he really cannot do so. No such rule can, in my opinion, be extracted from the statute, nor from the rules promulgated under their authority, nor from previously decided cases. It is, in my opinion, rather opposed to than supported by the course adopted by Sir Cresswell Cresswell, Lord Penzance, and Lord

(1) [1896] P. 165, at p. 170.

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Hannen. See *Muspratt* v. *Muspratt* (1); *Carryer* v. *Carryer* (2); *Jinkings* v. *Jinkings* (3); *Bagot* v. *Bagot*. (4) Some cases before Butt J. appear to be in conflict with these. But the truth is, there is no settled rule applicable to all cases, nor can I see how there should be. The rule laid down in *Jones* v. *Jones* (5) might be well suited to many cases, yet it might in many other cases press very hardly on a petitioner, without being the least necessary for the protection of the public. Such a rule might well be often relaxed where a wife had been living in a brothel, or where she had had a child of which her husband could not have been the father; and the rule would be most mischievous in those common cases in which a wife falsely accuses one man in order to screen another. Instead of following any such rule as that laid down in *Jones* v. *Jones* (5), the Court ought, in my opinion, to apply its mind to each particular case; and, being guided by the statute, the Rules of Court, and what experience shews to be dangers to be avoided, the Court should decide what in each case it is most just and expedient to do. Guided by this principle, I proceed to examine this particular case. [The Lord Justice referred to the facts as above stated, and continued:—] The adultery of the wife seems capable of easy proof. No evidence can be obtained against the man she accuses, and the petitioner cannot bring himself to swear that he believes that man to be the real adulterer. The solicitor's affidavit shews that honest efforts have been made to obtain evidence against him. I see no reason to doubt any part of this story. But, if Gorell Barnes J. had considered the evidence and had said that he was not satisfied with it, I should have thought it wrong to overrule his decision on such a point. He appears, however, simply to have decided the case on *Jones* v. *Jones*. (5) I cannot think this was right; and, as it is the duty of this Court to make the order which ought to have been made in the first instance, I am of opinion that the appeal should be allowed, and that leave to proceed without naming any co-respondent should be granted.

(1) 31 L. J. (P. & M.) 28.
(2) 4 Sw. & Tr. 94.
(3) L. R. 1 P. & D. 330.
(4) 62 L. T. (N.S.) 612.
(5) [1896] P. 165, at p. 170.

A. L. SMITH L.J. read the following judgment:—I am sorry not to be able to agree with Lindley and Rigby L.JJ. in this case.

[After stating the facts, the Lord Justice continued:—]

The respondent's non-attendance upon July 8, 1896, is, in my opinion, to be accounted for by the fact that by the Bastardy Act only a single and not a married woman can by law support such a summons, and her non-attendance does not necessarily shew that her statement as regards Harry is untrue. Now, in circumstances such as these, is a petitioner entitled to proceed without making the supposed adulterer co-respondent? The petitioner asserts that he is, because, as he says, he has only the wife's acts and statements to rely upon as proof of Harry's adultery with her, and they are not evidence against him; that he cannot obtain other evidence against him; and that, as he can establish the adultery of the wife by proof of the child's birth and by his own evidence of absence beyond the seas, he need not make Harry a co-respondent; and that, if Harry is not made a co-respondent, the case will probably be undefended and of small expense, whereas, if Harry is made a co-respondent, he will be dismissed from the suit for want of evidence against him, and he, the petitioner, will have to pay his costs. Assuming the wife's statement to be true, and that she did in fact commit adultery with Harry, I should think that the judge who tried the case would not by any means necessarily condemn the petitioner in Harry's costs, but, on the contrary, would leave Harry to pay his own costs, which he would richly deserve to pay.

[The Lord Justice read ss. 27 and 28 of the Act of 1857, and rules 4 and 6 of the Divorce Court Rules, and continued:—]

The "alleged adulterer" in the Act and rules, in my judgment, means the person with whom the accused wife is supposed to have committed the adultery charged; it does not mean only the person whom the petitioner may in his petition charge with the adultery. *Pitt* v. *Pitt* (1) shews that this is so. In that case the petitioner charged his wife with committing adultery with a person unknown. Lord Penzance held

(1) L. R. 1 P. & D. 464.

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that when a petitioner alleged adultery with a person unknown there was an "alleged adulterer" within the meaning of s. 28, although he was not named in the petition. I apprehend that one object, at any rate, which the Legislature had in view when they enacted that "the petitioner shall make the alleged adulterer a co-respondent" was, that the Court should have before it a person whose interest it was to prevent a decree from being obtained at his expense by collusion between the husband and the wife, and who might be able to check statements made by the one or the other. That some husbands and wives do agree together, to obtain, if possible, from the Court a decree for divorce for purposes of their own, cannot be denied. If the petitioner has been informed of the name of the person with whom the accused wife is supposed to have committed the adultery charged, in my judgment he is bound to insert the name of that person in his petition as co-respondent, "unless on special grounds to be allowed by the Court he shall be excused from so doing." No dispensing power is given to a petitioner in the matter, and I understand that the practice of the Divorce Court is that, if it finds that a petitioner was informed of the name of a person supposed to have committed the adultery charged with the wife, and has not made him co-respondent (no leave having been obtained to dispense with him), the Court stays the petition, and orders the supposed adulterer to be joined as co-respondent. The statute and the rules are not to be evaded by a petitioner upon his own motion leaving out of his petition the name of the person supposed to have been guilty of the adultery charged. This person cannot be left out, unless on special grounds the Court gives leave that he shall be. The petitioner cannot proceed with his petition, if he names no co-respondent, without the leave of the Court: *Pitt* v. *Pitt* (1) and *Tollemache* v. *Tollemache* (2) decide this. It clearly was not the object of the Legislature that the petitioner should, if he could, by not citing the alleged adulterer, get his petition through as an undefended case. Nothing, in my opinion, was further from their intention. It is said by Mr. Priestley, on behalf of the appellant, that, although the petitioner was

(1) L. R. 1 P. & D. 464. (2) 28 L. J. (P. & M.) 2.

informed of the name of the person supposed to have committed the adultery he has charged against his wife, and also where he was living when he filed his petition, yet it is permissible, according to the law and practice applicable thereto, for him to state in his petition that his wife has committed adultery with a person unknown, if he considers that he has not sufficient proof against the supposed adulterer to establish his guilt, and that in these circumstances the Court is bound to allow him to proceed without making the supposed adulterer a co-respondent. It is said that the decided cases shew that this is so, and that the learned judges of the Divorce Court have so laid it down. I must, therefore, examine the cases to see if this be so.

The first case is *Hook* v. *Hook* (1), which was decided in 1858 in the early days of the Divorce Court. There the wife was living in a brothel, and Sir C. Cresswell dispensed with the petitioner making a co-respondent, the learned judge stating that, although the petitioner might have some ground of suspicion, he might not have sufficient proof. Three years later, however, in 1861, in *Quicke* v. *Quicke* (2), where also the wife was leading the life of a prostitute, the same learned judge held that a petitioner ought not to be excused from making a co-respondent, unless it appears that he knows of no person with whom the wife has committed the adultery charged. What Sir Cresswell Cresswell said in this case is, to my mind, most important, and it entirely coincides with my own view of the statute and rules. He said: "I think the statute intended that the adulterer should be made a co-respondent, unless some special grounds for not doing so can be shewn. You ought to satisfy me that you are not able to make a co-respondent. If the petitioner is excused from making a co-respondent, he gets rid of one person who would have an interest in defeating the suit by placing before the Court the whole of the facts of the case. The more I see of the proceedings in this Court, the more am I convinced that it is necessary that the Court should be on its guard against collusive suits. Unless you satisfy me upon affidavit that he ought not to be a co-respondent, I think he ought to be upon the record." On the same day the same

(1) 1 Sw. & Tr. 183. (2) 31 L. J. (P. & M.) 28.

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learned judge had held that, if a petitioner had been excused from making a man a co-respondent, upon the ground that he did not know of a co-respondent when he petitioned, he need not afterwards bring the matter before the Court if all he knows is from the wife's confession: *Muspratt* v. *Muspratt*. (1) In 1865 Sir James Wilde, in *Carryer* v. *Carryer* (2), held that a petitioner must make every one against whom adultery is alleged in the petition a co-respondent, unless on special grounds he is excused by the Court from so doing. In this case that learned judge said that, if it had been clearly made out that there was no evidence against the person charged in the petition with adultery, excepting the wife's confession, he was not disposed to say that the Court would not have relieved the petitioner from making him a co-respondent. He discussed the question of costs, and also the motive of the Legislature in requiring that the alleged adulterer should be made a co-respondent, and he said that "the mere fact of want of evidence against the alleged adulterer might not in all cases be a sufficient reason for dispensing with a co-respondent." *Quicke* v. *Quicke* (3) was not then cited, but only *Hook* v. *Hook*. (4) Two years afterwards, in 1867, the same learned judge, in *Jinkings* v. *Jinkings* (5), held that, if the petitioner could obtain no evidence against the alleged adulterer named in the petition, excepting the wife's statements, he ought not to be obliged to make that person a co-respondent. This case is undoubtedly in favour of Mr. Priestley's contention. I know of no other case upon this subject, until twenty-one years afterwards, in 1888, when Butt J., in *Payne* v. *Payne* (6), would not follow *Jinkings* v. *Jinkings* (5), though it was cited to him, and he refused to accede to the application of the petitioner to be relieved from making an alleged adulterer a co-respondent. In the next year, 1889, Butt J., in *Gill* v. *Gill* (7), gave leave to a petitioner to dispense with making the alleged adulterer co-respondent, upon the authority of *Jinkings* v. *Jinkings* (5), though, as he said,

(1) 31 L. J. (P. & M.) 28.
(2) 4 Sw. & Tr. 94.
(3) 31 L. J. (P. & M.) 28.
(4) 1 Sw. & Tr. 183.
(5) L. R. 1 P. & D. 330.
(6) 60 L. T. (N.S.) 238.
(7) 60 L. T. (N.S.) 712.

with considerable reluctance. So far as appears from the report, his attention was not called to his own decision in *Payne* v. *Payne* (1) in the previous year. In 1890, in *Cornish* v. *Cornish* (2), where the alleged adulterer was resident at a known house in New York, Butt J. refused to dispense with his being made a co-respondent, although the petitioner stated that the only evidence he had was the wife's confession, the learned judge stating that, where the identity of the alleged adulterer was known to the petitioner, the Court, acting upon the terms of s. 28, ought to insist on his being made a co-respondent; the fact that there was no evidence against him but the wife's confession did not dispense with the necessity. This case is against Mr. Priestley's contention. In the same year (1890), in *Bagot* v. *Bagot* (3), Sir James Hannen dispensed with an alleged adulterer being made a co-respondent, no evidence against him being obtainable except the wife's confession, and (this is important) it appearing that the residence of the alleged adulterer was not known, it being believed that he was somewhere in the United States of America. So stand the cases down to 1890.

In this remarkable want of unanimity of practice amongst the great judges who have presided over the Divorce Court since its foundation, I can collect no such consensus of opinion as to establish any rule as to what constitutes "special grounds," within the meaning of s. 28 of the Act of 1857, for dispensing with a co-respondent. Since 1890 such authorities as there are shew that the mere fact that the petitioner has only the wife's confession to rely upon as to her adultery does not afford a special ground for dispensing with a co-respondent, if the petitioner has in fact information of the supposed adulterer's name and place of abode. This class of case is ever and again recurring. In *Jones* v. *Jones* (4) Gorell Barnes J. reviewed the cases, and, with the assent of the President (Sir Francis Jeune), laid down the rule, as I read it, that the mere fact of a petitioner being unable to obtain evidence against a man who is alleged to have committed the adultery charged with his wife, although

(1) 60 L. T. (N.S.) 238.
(2) 15 P. D. 131.
(3) 62 L. T. (N.S.) 612.
(4) [1896] P. 165.

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he has evidence that she has committed the adultery with him, is not of itself a sufficient special ground for exempting the petitioner from making that man a co-respondent. There must be something more. I agree with this rule. If it were held that the alleged want of evidence against the adulterer was sufficient, it would open the door wide to many a collusive suit,—collusive not only between the petitioner and the respondent, but also between them and the supposed adulterer. This certainly was not the intention of the Legislature, and against it the Court of Divorce is ever on its guard. This rule does not, as it seems to me, fetter the discretion which is given by the Legislature to the Court, when considering generally what are sufficient special grounds for dispensing with a co-respondent; it simply lays down that this one ground by itself is not sufficient. In the present case, for the reasons above given, I think that Gorell Barnes J. came to a right conclusion in refusing leave to the petitioner to proceed with his suit without making Harry a co-respondent; and that the appeal should be dismissed.

RIGBY L.J. read the following judgment:—The ground on which the petitioner asks for relief is very simple, namely, that he left this country for America in 1894, that he was absent during the whole of 1895, and did not return until May, 1896, when he found that in April, 1896, his wife had given birth to a child. If he is in a position to prove his absence beyond the seas during the whole period alleged by him, proof of the birth of the child would, of course, be conclusive of his wife's adultery, without further inquiry into the parentage of the child. His wife alleges that the father of the child was a man whose name she gives; but the petitioner's affidavits shew that he has tried and has failed to find any evidence against this man, and that he is unable to swear that to the best of his belief that man is the father of the child.

Under these circumstances the petitioner does not make a charge of adultery against him, or propose to adduce any evidence pointing to him as the father, but he charges against his wife adultery with some person unknown.

No doubt it was the duty of the petitioner, although he does

not allege adultery with his wife against any named adulterer, to apply to the Court for liberty to proceed without a co-respondent, stating in an affidavit the true state of things. This he has done, and he alleges the facts above mentioned as special grounds on which the liberty should be granted. Gorell Barnes J. has refused the application, relying, as we are told, on the rule laid down by him in *Jones* v. *Jones* (1), that where the relief sought against the respondent is on the ground of adultery alleged to have been committed with a man whose name and identity are known, and who is alive, the petitioner must make that man a co-respondent, and that the Court ought not to excuse him from so doing merely because he finds that he cannot obtain evidence which will prove his case against that co-respondent.

I entirely concur in all that has been said by Lindley L.J. as to the duty of the Court to avoid laying down any rule which can prevent it from exercising in each case the discretion given to it by the statute to relieve a petitioner on special grounds from the necessity of making a co-respondent. In my opinion, s. 28 of the Act of 1857 shews that the intention of the Legislature was, that such a discretion should be always vested in the Court. But, even as an enunciation of what ought to be the practice of the Court, I think the rule as interpreted by its application in *Jones* v. *Jones* (1), and in the present case, goes far beyond what is authorized either by the statute or by the previous decisions. The interpretation given to the rule by the decisions in *Jones* v. *Jones* (1), and in the present case, would carry the rule to this extent, that relief is to be sought on the ground of adultery with a particular man, although the petitioner himself disclaims any such ground of relief and does not propose to give evidence, even as against the respondent, which in any way points to the person suggested as a proper co-respondent, and that the wife's mentioning the name of a particular man as the father of her child is sufficient to oust the discretion of the Court, and to make it obligatory on the petitioner to bring a charge which he never intended to make against a man whom he may believe to be perfectly innocent.

(1) [1896] P. 165, at p. 170.

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I have examined the decisions which were referred to by Mr. Priestley, including all those which are commented upon by Gorell Barnes J. in his judgment in *Jones* v. *Jones*. (1) In several of them liberty to proceed without a co-respondent was given, notwithstanding that the petitioner had brought a charge against a specified man and had named him in the petition; and, down to the year 1896, I do not think there is a single case in which the Court has refused leave to the petitioner to proceed without a co-respondent, unless the petitioner has adopted a charge against a particular man by whomsoever originally made and has relied upon it in his petition. I do not say that this ought never to be done. There ought to be no hard and fast rule: each case should be determined on its own facts. *Quicke* v. *Quicke* (2), as I understand it, decided nothing more than that there must be an affidavit by the petitioner as to the facts on which he relies.

It is obvious that great hardship might be inflicted upon a petitioner, without any compensating probability of advantage to the person charged by the wife or to the public, by acting upon a rule that the wife's naming an adulterer should practically decide that he must be made a co-respondent. A guilty wife, naming one or more men as adulterers with her, even though this might be done for the purpose of screening the real adulterer, might thus render it practically impossible for the petitioner to proceed, and so deprive him of a divorce to which on the merits he would be entitled.

In the present case, whether or not it falls within the rule of *Jones* v. *Jones* (1), I am of opinion that the petitioner ought to be allowed to proceed without making a co-respondent.

Appeal allowed.

Solicitors: *Crowders & Vizard, for W. Howell, Llanelly.*

(1) [1896] P. 165, at p. 170.

(2) 31 L. J. (P. & M.) 28.

W. L. C.

THE ALTAIR.

1897
March 5, 6, 13.

Admiralty—Salvage—Towage—Stranding—Control of Tug by Tow—Contributory Negligence—Inequitable Agreement.

A barque, with a cargo of wheat from San Francisco, put into Falmouth for orders and left that port for Hull in tow under a contract to pay the tug a fixed sum. The tug set the courses without interference from the tow, but the latter regularly took soundings. When nearing the entrance to the Humber the weather became thick and, a sounding indicating shallower water, the master of the barque was about to signal to the tug, when his vessel took the ground, the wind at the time being light and the sea smooth. A second tug then came up, and, as her master would not take less, the master of the barque agreed to pay 500*l.* if she would assist the first tug in an endeavour to tow the vessel off that tide. The efforts of the two tugs proved unsuccessful, and the second tug, having been sent to Grimsby for more tugs, returned with two others, whilst men from the shore assisted the crew in jettisoning some of the cargo. The four tugs then took hold of the vessel and she came off, and was subsequently safely docked at Hull. The owners, masters, and crews of all four tugs claimed salvage. The defendants, the owners of ship, cargo, and freight, alleged that the stranding was due to the negligence of the first tug, and counter-claimed against her for the loss of cargo and for any salvage they might have to pay the other salvors. They further submitted that the agreement with the second tug should be set aside as unreasonable and made under duress:—

Held, by Gorell Barnes J., that the first tug was responsible for the direction of the course, and, having been negligent in respect of it and in not taking soundings, her claim for salvage must be dismissed, but that, on the authority of *Smith* v. *St. Lawrence Tow Boat Co.*, (1873) L. R. 5 P. C. 308, the counter-claim of the defendants must also be dismissed, as their master was guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather. As the second tug incurred no risk, the agreement with her must be set aside as unfair, and a reasonable sum for the whole of her salvage services awarded. As the two other tugs rendered their services at request, they were entitled to salvage though the vessel could have been got off without their assistance. The three last-mentioned tugs were also entitled to a small sum for docking, payable, as towage, by the ship only.

Consolidated Actions of Salvage.

The plaintiffs were the owners, masters, and crews of the steam-tugs *Blazer*, *Humber*, *Gipsy King*, and *Southern Cross*. The defendants were the owners of the barque *Altair*, her cargo and freight.

1897

THE ALTAIR.

The case is reported first on the question of the relative duties of tug and tow with reference to the navigation during the towage; and, secondly, on the question of setting aside a salvage agreement as unfair to the owners of the salved vessel.

The facts and arguments fully appear from the judgment.

Aspinall, Q.C., and *Crawford*, for the owners, master, and crew of the tug *Blazer*.

Sir Walter Phillimore, and *Butler Aspinall*, for the owners, masters, and crews of the tugs *Humber*, *Gipsy King*, and *Southern Cross*.

Joseph Walton, Q.C., and *Stubbs*, for the defendants, the owners of the *Altair*.

[In addition to the cases cited in the judgment, the following were referred to: On the liability of the tow for not controlling the tug: *The Niobe*. (1) On the duty of the tug where her master is more competent to form an opinion: *The Isca*. (2) On the question of contributory negligence of tow: *Radley* v. *London and North Western Ry. Co.* (3) On the binding nature of the salvage agreement: *The Prinz Heinrich*. (4)]

Cur. adv. vult.

March 13. GORELL BARNES J. In this case the owners, masters, and crews of the tug *Blazer*, of Liverpool, and of the tugs *Humber*, *Gipsy King*, and *Southern Cross*, of Grimsby, claim salvage remuneration for services rendered by those tugs to the *Altair*, a four-masted German barque of 2346 tons register, which stranded about one and a half miles E.S.E. of the beacon at Donna Nook, to the south of the entrance to the Humber, shortly before 5.30 A.M. on January 19 last, whilst on a voyage from San Francisco to Hull, with a cargo of wheat, and drawing 22 ft. 9 in. The defendants, the owners of the *Altair*, her cargo and freight, admit that the Grimsby tugs are entitled to salvage, and the only question so far as they

(1) (1888) 13 P. D. 55.
(2) (1886) 12 P. D. 34.
(3) (1876) 1 App. Cas. 754.
(4) (1888) 13 P. D. 31.

are concerned is one of amount. The defendants, however, dispute the right of the plaintiffs interested in the *Blazer* to recover salvage, on the ground that the stranding of the *Altair* was (as the defendants allege) caused by the negligence of those in charge of the *Blazer*, and they counter-claim against the owners of the *Blazer* for the damages sustained by the defendants in consequence of the said alleged negligence.

It will be convenient to dispose of the claims of the Grimsby tugs first.

The *Altair* grounded at the place aforesaid, about a quarter of an hour before high water, whilst in tow of the *Blazer*, having been towed by that tug from Falmouth. The wind was light from about N.N.W. and the sea smooth. The weather was foggy at the time of the grounding, but it cleared in a few minutes afterwards. The *Altair* swung nearly parallel with the shore, and rested on a hard level bottom. The *Humber*, a tug engaged in salvage operations on work and labour terms at a vessel called the *Arcadia* (a steam trawler aground not far from the *Altair*), left this work and came to assist the *Altair*. The master of the *Humber* required the sum of 500*l.* to tow for the one tide, whether the vessel came off or not, and as he refused to take a penny less than this sum, and as the *Humber* was the only tug there besides the *Blazer*, the master of the *Altair* was compelled to accept these terms, and engaged the *Humber* to assist the *Blazer*. The *Blazer* and the *Humber* towed for an hour or an hour and a half, and at first moved the *Altair* a little, but as the tide fell she remained fast. The *Humber* was then sent to Grimsby for more tugs, and returned with the *Gipsy King* and *Southern Cross*. In the meantime men from the shore assisted the crew in jettisoning cargo, and about 224 tons were thrown overboard of the value, including freight, of about 1500*l.*, and the vessel was thereby lightened to the extent of 9 inches. It was high-water about 6.12 P.M., and about 4 P.M. the four tugs began to tow at the *Altair*, and in about half-an-hour, in fact almost as soon as the full strain of the tugs was felt, the *Altair* came off. The master of the *Humber* was on the *Altair* directing the tugs.

The *Altair* was then taken by the tugs to an anchorage off

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Grimsby, one of them, the *Gipsy King*, fetching a pilot; and later on they all assisted her into dock at Hull, although the master of the *Altair* objected to more than one tug assisting after the vessel was successfully taken off the ground. At the time when the vessel came off the wind was a moderate breeze from the eastward, and there was little sea. There was a fresh breeze on the 20th from the eastward. The weather on the 21st was moderate, and on the 22nd there was bad weather from the N.E.

The *Altair* sustained no damage from the grounding. The total value of the property salved was 36,276*l.*

As the vessel came off when the tide had still a considerable time to rise, and as she had been lightened by the jettison, and having regard to the fact that the *Blazer* is larger and more powerful than the three other tugs put together, the Elder Brethren are of opinion that the *Altair* would in all probability have come off at or before high-water on the afternoon tide by the exertions of the *Blazer* alone.

The first question to determine is whether or not the agreement to pay the *Humber* 500*l.* is to stand. The principles which are to guide the Court in determining this question have been indicated in many cases. In one of the last, *The Strathgarry* (1), they were fully considered by Bruce J., and I need not repeat what is stated in his judgment.

The question to be determined is whether the agreement, which was undoubtedly made under compulsion, was manifestly unfair or unjust. The position of the *Altair* was serious if any bad weather came on, and the value of the property was large, but the wind at the time of the first towage was light and the sea smooth. I am advised that there was no risk whatever to the *Humber* in the towage, and although she left the *Arcadia* to assist the *Altair*, and although the importance to the latter vessel of prompt assistance before the tide fell was great—for if she had been towed off at once her difficulties would have been ended and the jettison of the wheat avoided—yet in my opinion, as the *Humber* was only assisting the much more powerful tug *Blazer*, and was incurring no risk in the

(1) [1895] P. 264.

circumstances in doing so, it could hardly be expected (in my opinion, having regard to numerous former decisions of this Court) that there was any reasonable certainty of her obtaining a reward exceeding the sum of 500*l.* for a successful hour's towage; whereas if the tug were paid for towing for that time unsuccessfully at ordinary towage rates a very trifling sum would be sufficient.

I am of opinion that under the circumstances the bargain was manifestly unfair and unjust. The case of *The Strathgarry* (1) was relied on; but the circumstances of that case were totally different from those of the present case. Bruce J. found that the master of the *Strathgarry* preferred the form in which the agreement was made, and wished to prevent the possibility of a larger claim being made upon him in the event of the towage leading to a successful result, and that the performance of the towage involved considerable risk to the salving vessel.

If there had been any material risk to the *Humber* in performing the towage, my opinion would have been different.

To sanction the agreement in this case would practically tend to encourage the masters of tugs round the coasts of this country to refuse to render services for less than what they might rely on receiving if their services should prove successful, and to stipulate that they should be paid to this extent whether their services should be successful or not, even though the services involved no risk to the tugs.

Estimating the services of the *Humber* on ordinary salvage terms, I am of opinion that for those services which were, shortly stated, towing on the morning tide, proceeding to Grimsby for tugs, taking part in the successful services on the evening tide, and assisting the vessel to an anchorage, the sum of 400*l.* is an adequate remuneration.

The services of the *Gipsy King* and *Southern Cross*, treating them as continuing till the vessel was anchored, though they ceased to be necessary as soon as she came off, were rendered in fine weather and without any risk to the tugs. As matters turned out, I believe that the vessel would have come off

(1) [1895] P. 264.

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without the assistance of these tugs, and that their services were not really necessary. At the same time, they came at request, and did what they were required to do efficiently, and it was no doubt desirable that there should not be the least uncertainty about the vessel coming off on the afternoon tide. I award to the *Gipsy King* the sum of 200*l.*, and to the *Southern Cross*, the more powerful and valuable of the two, the sum of 300*l.* The three tugs insisted on attending the *Altair* into dock, although her master protested and although only one tug besides the *Blazer* was necessary; and as a claim for these services, which are only towage services, is made, it is desirable to dispose of it in this suit. It was stated that two-fifths of 60*l.* would be paid to a second tug for assisting such a vessel in from sea, and therefore for assisting from the anchorage I think 20*l.* is quite enough. This sum is to be paid by the owners of the *Altair*, as they would have had to pay about this sum in ordinary course, and it must be divided between the three Grimsby tugs.

The said sums of 400*l.*, 200*l.*, and 300*l.* make 900*l.* in all, and if the *Blazer* is entitled to salvage reward, then, having regard to her value, size, and power compared with those of the other tugs, the total amount to be awarded for salvage in this case would possibly be double that sum.

An important question, however, arises with regard to the claim of the *Blazer* and the counter-claim. It was not disputed that if there were no fault on the part of the *Blazer* in relation to the grounding of the *Altair* the services of the *Blazer* in assisting to get the *Altair* off the ground and to a place of safety were outside the scope of the towage contract; but, in answer to the *Blazer's* claim for salvage, it was alleged that the grounding of the *Altair* was solely due to the negligence of those on board the *Blazer*, and that, therefore, not only could she not claim salvage, but that her owners were liable for breach of the towage contract or breach of duty to the extent of the losses incurred by the defendants, including the amounts awarded to the remaining tugs, and that in any event the *Blazer* was guilty of contributory negligence, and could recover no salvage.

The law applicable to the relation between tug and tow was

stated by Lord Kingsdown in the case of *The Julia*. (1) The passage to which I refer was quoted by Sir Barnes Peacock in delivering the judgment of the Privy Council in the case of *Smith* v. *St. Lawrence Tow Boat Co.* (2), and by Lord Blackburn in the House of Lords in the case of *Spaight* v. *Tedcastle*. (3) It is as follows: "When (such a) contract is made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one, without any default on the part of the other, no cause of action would arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not, by any misconduct or unskilfulness on his part, contributed to the accident."

In the present case the *Blazer* was engaged to tow the *Altair* from Falmouth to Hull for the sum of 120*l*. At Falmouth the master of the *Blazer* gave the master of the *Altair* a code of signals for use on the voyage, and some further signals to be used in case of fog were exchanged. The master of the *Blazer* said that he told the master of the *Altair* that the navigation of the ship would depend on the latter. The master of the *Altair* denied this, and further said that the master of the *Blazer* told him that he (the master of the *Blazer*) had been several times to the Humber, and that the last time was not very long since. This was denied by the master of the *Blazer*. The master of the *Altair* was an excellent witness, and I believe his version of what occurred then and subsequently.

After the vessels left Falmouth the course was set by the *Blazer* and never interfered with by those on the *Altair*.

(1) (1861) Lush. 224, at p. 231; 14 Moo. P. C. 210, at p. 230.

(2) L. R. 5 P. C. 308, at p. 314.

(3) (1881) 6 App. Cas. 217, at p. 220.

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When the vessels were off the Outer Dowsing Light-vessel at 10.30 P.M. on January 18, a departure was taken by the tug from a point between five and six miles from the lightship, which then bore about N.N.E. The course set by the tug and followed by the ship was N.W.$\frac{1}{4}$W. magnetic, and it was pursued at a speed of about four knots an hour until the stranding. The master of the tug and the master of the ship both calculated that this course would bring them to the Spurn Lightship; but it is quite clear, having regard to the chart, the sailing directions, and the state of the tide, which was about two days before the highest spring tide, and set to the southward from 12.20 A.M., that a sufficient allowance for its effect was not made by them. Pursued as this course was it naturally brought the vessels to the place of stranding, far to the southward of where they should have been. At the time the departure was taken it was clear weather, but it afterwards came on foggy. If the vessels had been on a proper course the Spurn Lightship would have been seen or its fog-signal heard. This signal began to be sounded at 2.10 A.M., and continued to be sounded till 5.25 A.M. At the time of the stranding the vessels had run a distance from the point of departure almost exactly equal to that from that point to the lightship, and as nothing was seen or heard of the lightship the masters should have known for some time before the stranding that the vessels were not on a proper course. No soundings were taken from on board the tug. On board the *Altair*, however, soundings were taken, the first at 3.40 A.M., when a sounding of 8½ fathoms was obtained, and from that time soundings were taken every five or ten minutes, 8 fathoms being always the result. At about 5.20 A.M. a sounding was obtained from the *Altair* of about 7 fathoms 4 feet, and thereupon the master was preparing to signal the tug when a sound of breakers was heard on the port bow, and although the tug then ported, before anything further could be done the tug touched the ground, and the *Altair* grounded and remained fast at the spot above stated.

The Elder Brethren advise me that the course pursued by the vessels was, in the circumstances, an improper one, and

more particularly that it was negligent to continue it so long when nothing was heard or seen of the Spurn Light-vessel; and, further, that the master of the tug ought to have taken, or caused to be taken, repeated soundings. The excuse made by him was that he thought the ship should sound, and that he could not take soundings easily without stopping. But the Elder Brethren tell me that in ordinary practice in thick weather both tug and tow ought to sound, and that soundings could easily have been taken from on board the tug even while she was in motion, and that the soundings, if taken by the tug as the vessels proceeded, would have shewn that they were not on the correct course, and that if a sounding had been taken by the tug, the leading vessel, shortly before the stranding, it would have shewn that she was close inshore, and warned her to haul out at once, and that if she had only done so the stranding of the *Altair* would not have occurred.

If the responsibility for the course and soundings rested with the tug, I have no doubt that those on board of her were negligent with regard thereto, and that this negligence led to the disaster. But it was urged before me that the control of the navigation in these respects was with the ship alone, and that those on board of her should have checked the tug's course, and are solely responsible for not doing so, and that at any rate those on board the ship were guilty of negligence in not so doing, and that their negligence contributed to the grounding.

It is necessary, therefore, to consider where the responsibility rested, and the conduct of those on board the *Altair* in the matter. The first point depends upon the application of the principles laid down in the case of *The Julia* (1), to which I have above referred. Two cases illustrate how these principles should be applied. The first is the case of *The Robert Dixon* (2), where a tug, which was engaged to tow a vessel from Liverpool round the Skerries, towed her without receiving any directions after the vessel got out to sea on such a course, in bad weather, that she was set towards the shore, required to be towed out from danger, and sustained the loss of anchors

(1) Lush. 224.

(2) (1879) 5 P. D. 54.

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and chains. It was held that the tug could not claim salvage remuneration, and that her owners were liable for the loss. Lord Esher said (1): "I am very much inclined to think that a tug is bound to obey the orders of the captain, and if the captain had insisted on the tug keeping that course, the tug would have been bound to obey; certainly, the captain could not have complained of the tug obeying him. But here, on the plaintiffs' own shewing, the only evidence was that at the beginning of the towage the tug was directed to tow the ship in a particular course. I assume that to have been the right course; but on the way the weather became threatening. Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and, unless she was ordered to the contrary, she had the command of the course." No point was made in that case of negligence on the part of the ship. There may have been some difficulty about giving orders in the bad weather from the ship to the tug, or some other grounds negativing an inference that the ship acquiesced in the course taken by the tug.

The other case is *Smith* v. *St. Lawrence Tow Boat Co.* (2), where a vessel in tow of a tug proceeded in a thick fog and grounded in consequence in the River St. Lawrence, and it was held that the weather was so bad that the vessels ought not to have been under way, and that as they continued under way without any attempt on the part of those on board the tow to stop the tug, those persons must be taken to have assented to the tug proceeding; that there was negligence on the part both of those on board the ship and tug in proceeding in the way in which they did during the fog; and that as those on the ship contributed to the accident which occurred the owners of the ship could not recover from the owners of the tug for the loss they had sustained. The danger of proceeding in that case was obvious. Sir Barnes Peacock, in delivering the judgment of the Privy Council, said (3): "It appears to be clear that, when no directions are given by the vessel in tow, the rule, in the case of tug steamers, is that the tug shall direct the course.

(1) 5 P. D. 54, at p. 58. (2) L. R. 5 P. C. 308.
(3) L. R. 5 P. C. 308, at p. 313.

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The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow." Then he proceeded to point out how both vessels were negligent for proceeding in the fog, and that the ship contributed to the accident by negligence in allowing the tug to proceed, and not ordering her to stop when it was dangerous to the knowledge of those on board the ship to proceed.

There seems no doubt that the tug is under the control of the master of the ship; but practically the tow cannot be always giving directions as to the course set by the tug, and I am informed by my assessors that the tow usually does leave the course, in such towages as the present, to the tug, and would not interfere unless there were reasonable grounds for doing so. As a matter of fact, in the present case the direction of the course was assumed by the tug; and it was perhaps not unreasonable that it should be so, because the master of the tug had been to the Humber several times before, whereas the master of the *Altair* had only once sailed out of that river in the year 1884.

I am of opinion, therefore, that as no directions were given by the ship to the tug, the latter was responsible for the direction of the course. I have found that the negligence of those on the tug in the matters above stated caused the disaster, and I hold that no salvage remuneration can be claimed by her.

Then, was the master of the *Altair* negligent in not checking the course of the tug, by signal or otherwise? In his favour it was contended that he knew that the tug master had been in the Humber before, and might reasonably expect the tug master, with this experience, to make proper allowances for the tide, and that although the soundings which he (the master of the *Altair*) was getting would, if carefully considered, shew that he was approaching shallower water, yet that he might reasonably expect that the leading vessel would take soundings, and act upon them if they shewed that the tug, which was 135 fathoms ahead of the tow, was getting into shoal water, so as to render it necessary to haul her tow off.

The master of the ship, however, had the same sailing

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directions and chart as the master of the tug had, and should have known that the course set from the Outer Dowsing Lightship did not allow sufficiently for the tide. If the weather had remained clear this would not have been so important, because the Spurn Lightship would have been made, and the course could have been changed. But the weather became foggy, and when the vessel had run nearly the distance to the Spurn Lightship without it being seen or heard, ought the master of the ship to have allowed the tug to proceed?

I am advised that he ought not to have done so. The entrance to the Humber is dangerous unless vessels entering are sure of their position. The channel between the Spurn Lightship and the Bell Buoy is only a mile and a half wide, and it seems to be essential that, in such weather as existed, the lightship should have been made out before the entrance was attempted, and that if that could not be done the vessel should have hauled off and waited till the weather cleared. The soundings taken by the master of the *Altair* should have shewn him that he was running into shallow water.

I am of opinion that the master of the *Altair* was negligent in not checking the course of the tug. He was about to do so when the accident happened, but it was too late. In my opinion, and in that of the Elder Brethren, he was allowing the vessel to run unchecked into obvious danger. Moreover, if he had ported his helm as soon as he had obtained the last sounding the vessel would probably not have grounded.

If I were to hold that the master of the *Altair* was blameless in the matter, I should in effect decide that the master of such a vessel was justified in trusting the course entirely to his tug when entering a difficult port in foggy weather, and I think I should be introducing a dangerous precedent.

It was further contended for the defendants that, notwithstanding negligence on the part of the master of the *Altair*, the defendants could still recover on their counter-claim, and the case of *Davies* v. *Mann* (1) and other cases following it were relied on. But the proposition established by these cases is that, "Although there may have been negligence on the part of

(1) (1842) 10 M. & W. 546.

the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the defendants' negligence he is entitled to recover." From what I have found as to the negligence of the master of the *Altair*, it follows, in my opinion, that he might, by the exercise of ordinary care, have avoided the consequences of the tug's negligence, and ought to have done so. I find that the grounding was directly contributed to by the negligence of both the masters. The case is analogous to the case in the St. Lawrence.

I therefore give judgment in favour of the Grimsby tugs for the sums of 400*l.*, 200*l.*, and 300*l.* against the defendants, and for 20*l.* against the defendants, the owners of the *Altair*, with costs. I pronounce against the claim of the owners, master, and crew of the *Blazer*, with costs, and against the counterclaim.

Solicitors for plaintiffs, the owners, master, and crew of the tug *Blazer*: *Pritchard, Englefield & Co., for Miller & Williamson, Liverpool.*

Solicitors for plaintiffs, the tugs *Humber*, *Gipsy King*, and *Southern Cross*: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants, the owners of the *Altair*, her cargo and freight: *Stokes & Stokes.*

T. L. M.

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March 2, 3, 29.

[IN THE COURT OF APPEAL.]

THE RATATA.

Admiralty—Damage—Stranding — Contract of Towage—Duty of Harbour Authority—Burden of Proof—Ribble Navigation Act, 1883 (46 & 47 *Vict. c. cxv.*)—*Practice—Appeal—Security for Costs.*

By the Ribble Navigation and Preston Dock Act, 1883 (c. cxv.), the defendants are constituted the port and harbour authority for the port and harbour of Preston. As such authority, they levy tolls in respect of all vessels using the port and harbour, and make a charge for towage, only allowing tugs licensed by them to tow within the port and harbour. By the terms of the contract of towage, the master and crew of the tug become for the time being the servants of the tow.

The plaintiff's barque arrived at the mouth of the River Ribble with a cargo of timber for Preston. She was there lightened by the defendants, and, under the direction of their harbour-master, proceeded, in charge of a pilot, up the river in tow of a tug belonging to the defendants, preceded by two other vessels each in charge of a pilot and in tow of a tug. The three vessels started in due time to save the tide, and followed one another on account of the narrowness of the channel. From some unexplained cause the tug, chartered by the defendants to tow the leading vessel, slowed down, and took over an hour instead of thirty-five minutes to do the last five miles. The water in the meantime fell, and the plaintiff's barque, which was the last and deepest of the three, on arriving at the shallowest part, grounded and remained fast. In an action for the damage so sustained, the President (Sir F. H. Jeune) gave judgment for the defendants, on the ground that they were not answerable to the plaintiff for the failure of the leading tug.

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.), reversing the decision of the President, that the defendants were liable, as they had failed to rebut the primâ facie case against them of negligence in obstructing the fairway, for it was an implied term of the contract between the plaintiff and the defendants that the defendants would take, and it lay on them to shew that they had taken, reasonable care to supply a properly equipped leading tug so as to enable the string of vessels to get up safely on the one tide.

The plaintiff, a foreigner residing abroad, on instituting his action, deposited 350*l.* by way of security. On judgment being given for the defendants, 308*l.* 13*s.* 10*d.* of this sum was paid over to the defendants by way of costs, and the balance returned to the plaintiff, who, on his appeal being successful, claimed the return of the costs :—

Held, by the Court of Appeal, that, in the circumstances, a stay would be

granted, unless the plaintiff's solicitors gave an undertaking to refund any costs in the event of the defendants' appeal to the House of Lords being successful.

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APPEAL by plaintiff, on behalf of himself and others, the owners of the Norwegian barque *Ratata*, against a decision of the President (Sir F. H. Jeune) holding the defendants, the mayor, aldermen, and burgesses of the borough of Preston, not liable for the damage sustained by the barque in grounding in the River Ribble.

The defendants are, by the Ribble Navigation and Preston Dock Act, 1883 (46 & 47 Vict. c. cxv.), incorporating the Harbours, Docks, and Piers Clauses Act, 1847, constituted the port and harbour authority of Preston, and on March 16, 1895, the plaintiff wrote to them for particulars as to the port of Preston. In reply the plaintiff received from the defendants' harbour-master a printed book giving information as to the harbour tolls and dock rates payable to the corporation in respect of vessels using the port of Preston, and stating that "it is within the discretion of the dock superintendent to lighten vessels free of cost to a maximum extent of 2 feet 6 inches," but the corporation "will not be responsible for any . . . . delay loss or damage in connection with the free lightening of vessels, nor as to the sufficiency of such lightening." Under the head of "tidal information" the corporation recommended shipowners sending vessels to the port of Preston to "allow a margin of 2 feet under the keel." The book also gave the scale of charges for towage, and stated that "only tugs licensed by the corporation may tow within the port and harbour."

On July 15, the *Ratata*, of 567 tons register, and drawing eighteen feet Swedish (1), from Shediac to Preston with a cargo of 271 standards of deal, arrived in the Bog Hole, being the deep water, opposite Southport, in the estuary of the Ribble within the port and harbour of Preston. Her master proceeded to

(1) The Swedish is shorter than the English foot, but the difference of about three inches in the total draft may be neglected, as the density of the water in the Bog Hole as compared with that near Preston operated in a contrary direction.

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Preston, accompanied by the ship's agent, and saw the harbour-master, who proposed to lighten the vessel one and a half to two feet, and on July 18 a lighter took out fifty-two standards, bringing the vessel's draft down to sixteen feet eleven inches Swedish. The master then went to Preston again, and, in company with the ship's agent, saw the harbour-master about the draft, and was told that it was not necessary to take any more cargo out.

On July 23 the harbour-master came in a boat alongside, looked at the vessel's draft, told the master that there was water enough, and that he was to proceed up the river the same night along with two other vessels. He further said that a pilot would come and that a tug would be sent. A Trinity House pilot then came on board and took charge. About 7.30 P.M. the tug *Enterprise*, belonging to the defendants, arrived, and the tug-master handed the master of the *Ratata* a printed note containing the conditions of towage, by which "On the hiring of the steam-tug for towing services the master and crew thereof become the servants of and identified with the ship and are under the control of the person in charge of the ship during the performance of the contract. The corporation of Preston are therefore not responsible for the acts or defaults of the master or crew of the steam-tug, and they are not to be responsible for any damage or loss that may arise to the ship or cargo, nor for any damage caused by any defect in or happening to the machinery of the steam-tug or to the towing gear by perils or accidents of the sea rivers or navigation, collision, stranding, straining, fire, explosion or arising from boilers, steam machinery, or towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence, default, or error in judgment of the pilot, master, officers, engineers, crew, or other servants of the corporation."

The *Enterprise* then took the *Ratata* in tow, but, according to the practice, allowed the two vessels of lighter draft to go on ahead, so that the *Amal*, drawing fifteen feet eight inches, led in tow of the tug *Vixen*, followed by the *America*, also in

tow of a tug of the defendants, and each vessel having a pilot on board.

The vessels all started in due time, and reached the Naze, about six miles from Preston, by midnight, still keeping such time as would have enabled them all to have passed the shallowest part of the river, about seventeen miles up, 300 yards from the dock, and 120 feet broad, in the period ten minutes before high tide (which was at 12.40), and fifteen minutes after, during which the water remained at its highest point, calculated at seventeen feet nine inches (and in fact four inches more); but the tug *Vixen* slowed down, and was so long doing the last five miles that, in the meantime, the water fell about fourteen inches over the shoal on the south side of the fairway at this part of the river, and, as the *Ratata* could not pass ahead, on account of the narrowness of the channel and the sheering of the *Amal*, nor turn back, she grounded at 1.10 A.M. on the 24th.

The plaintiff sued the defendants for the damage sustained by the stranding, and alleged (inter alia) that the defendants' harbour-master, whose orders those in charge of the *Ratata* were bound to obey, had improperly neglected sufficiently to lighten the vessel, and had improperly ordered her to proceed up the river to the docks when her draft of water was too great for her to do so in safety. In the alternative, the plaintiff alleged that the defendants improperly neglected to take proper measures to keep the fairway leading to the docks free for the *Ratata* to pass, and improperly allowed other vessels in tow of steam-tugs of low power to precede the plaintiff's vessel, whereby the *Ratata* was so much delayed that she was unable to reach the docks by high water.

In support of his case, the plaintiff, on July 18 and 20, 1896, called the master, the agent of the owners, the pilot of the *Ratata*, and the mate of the *Amal* to prove the facts set out above, also an expert as to the deficiency of water in the Ribble; and, on a question arising as to the burden of proof in respect of the cause of the slowing down of the *Vixen*, the plaintiff elected to call the master of that tug, but only elicited that he attributed the dropping of the steam to bad coals

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supplied by the corporation. To rebut this evidence the defendants called their resident engineer, who stated that the tug was chartered by the corporation, that though not as powerful as the *Enterprise*, she was quite capable of towing any one of the three vessels on that occasion, and that no complaints were made about the coals. The engineer and the fireman of the *Vixen* were in attendance, but the defendants did not call them.

1896. July 22. In dismissing the plaintiff's claim with costs the President said: "The officers of the corporation assured the master of the *Ratata* that his vessel could go up safely as regards the depth of water. They did that because they regarded a margin of about nine inches as sufficient. It is unnecessary to inquire whether the two feet of margin recommended by the corporation in the books circulated by them, or some other margin greater than nine inches, would not, for vessels of the size of the *Ratata*, be more prudent. In the present case a margin of nine inches would have been sufficient, even if the tide had been only at the calculated height, but . . . . that . . . . after the Naze, owing, I believe, to bad stoking, the *Vixen's* speed fell off. She should have accomplished five miles in thirty-five minutes; but, in fact, she occupied an hour in doing so." With reference to the liability of the defendants for the obstruction caused by the *Vixen* the learned judge said: "The meaning of the representations made by the corporation were, I think, that, allowing the margin I have mentioned for ordinary contingencies (such as variations in height of tide from that calculated, recent accumulations of silt in the river, and it may be the retardation of the vessels in the river to the extent which might be expected to occur in the ordinary course of things), the *Ratata* might go up on the tide in question in safety. But those representations did not mean that that safety would continue if unusual contingencies occurred, and such, I take it, is a vessel in front of her wholly or partially breaking down. The case seems to me substantially the same as if the *Ratata* had herself to some extent become disabled. The corporation represented that the depth of water was sufficient, but this did not

represent or guarantee that the fires of the *Vixen* would be kept in perfect order, and this misfortune occurred because they were not; nor were the corporation, I think, in any other way answerable for the failure of the *Vixen*."

On appeal,—

Sir Walter Phillimore, *Robson*, *Q.C.*, and *H. Stokes*, for the appellant (plaintiff). The defendants levy tolls for the use of the harbour, and make a charge for towage, and are therefore under an implied contract not to obstruct their own fairway, for although during the performance of the towage contract the master and crew of the tug *Vixen* were, by the terms of the contract, the servants of the *Amal*, still, as against the plaintiff, who was no party to that contract, the tug *Vixen*, whether chartered or owned by the defendants, was the servant of the defendant corporation, and, as the arrangement of the vessels in a string was by direction of the harbour-master, the corporation is liable to the plaintiff under their contract of towage with him for creating an obstruction in the fairway, by providing an inefficient leading tug. The corporation was bound to furnish a safe passage for the *Ratata*, subject to unavoidable contingencies; but the slowing down of the *Vixen* was a matter which could have been prevented by ordinary care. The plaintiff made out, in the Court below, a primâ facie case of breach of duty which the defendants have not disproved.

Joseph Walton, *Q.C.*, and *F. Laing*, for the respondents, (defendants), the corporation of Preston. The defendants can only be made liable for the grounding of the *Ratata* by shewing some breach of contract or duty on their part, that is, there must be some act of negligence by the servants of the corporation for which they are responsible; but, so far as the defendants were concerned, the *Ratata* could have gone up to the dock in safety, for an efficient tug was supplied to take her there, and the statements by the harbour-master as to the depth of water in the Ribble were correct. The master and crew of the tug *Vixen* were not the defendants' servants in fact, as she was a chartered vessel, and, by the contract of towage, the master

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and crew of the tug were for the time being the servants of the *Amal*. Assuming, however, that the master and crew of the *Vixen* were the servants of the defendants, no act of negligence has been proved. The tug was in good order, and there was a sufficient crew. The vessel was not of low power, as was alleged in the statement of claim, and the coals were not bad, as was attempted to be proved by evidence; the "bad stoking" referred to by the President in his judgment is only surmise, it was not proved, and if it had been proved, and if the defendants were responsible for bad stoking, and if the tug did cause an obstruction, still there was no relationship, contractual or otherwise, between the plaintiff as an owner of the *Ratata*, and the defendants as charterers of the *Vixen*, which would render the defendants liable to the plaintiff for the grounding. The defendants never gave the plaintiff a warranty that no vessel in their employ would obstruct the fairway, and for accidents arising from unavoidable contingencies, or the acts of third persons, the defendants cannot be made responsible.

[The cases of *Laugher* v. *Pointer* (1) and *Quarman* v. *Burnett* (2) were referred to.]

LORD ESHER M.R. The defendants have undertaken to make the natural River Ribble into a waterway very much in the nature of a canal, and they have also undertaken to manage the taking of vessels up from the entrance of the river to the harbour at Preston. Now, there must be several modes in which they can perform that which they undertake. If there is a vessel of some size, they will supply a tug and conduct her up by herself. But if there are several smaller-sized vessels, then we see now that one mode of doing what they undertake to do is to put these vessels one behind the other, and so make a string of them—not fastening them together, but putting a tug between each of the vessels. To conduct that operation properly, they must get them up, from wherever they start, to Preston on the one tide; for if they go over their tide, so that the water falls, some of those vessels must inevitably take the ground.

(1) (1826) 5 B. & C. 547. (2) (1840) 6 M. & W. 499.

What is it, therefore, they undertake to do? They undertake the towage of each of those vessels. Now, what does that consist of? It consists in supplying a tug to each of the vessels, placing the vessels in a line, starting them all at the same time, and so managing the operation that each will arrive in the harbour at Preston on that tide. That is what they undertake to do, that is what they charge for, and that is what they are paid for. They are not paid for supplying a tug to each of those vessels, and nothing more. They charge for conducting the whole operation; but, in order to perform that which they have undertaken to do, and for which they charge, they charter tugs from other people. When they have taken them from the tugowners, the owners of these vessels that are to be brought up the river have nothing to do with the tugowners. The relation is between these defendants and the owners of the tugs. The defendants supply these tugs to each of these persons as tugs belonging to them, and therefore, as between the defendants and the plaintiff, it seems to me that the defendants cannot say that the tugs are not theirs. It is immaterial to the plaintiff whether the tugs are the defendants' tugs or not. As between them, the tugs are the defendants' tugs, but they cannot perform this operation with a tug with nobody on board, and therefore they have people on board, and, as between the defendants and the plaintiff, when the defendants undertake to supply a tug for the purpose of this operation, it seems to me that, as between them, the plaintiff has a right to say to them: "Those sailors on board the tug which you thus supplied are your servants, as between you and me. You have the power to order them to do what they ought to do; I am passive in the transaction; I cannot give orders to the people on board the tugs as to what they ought to do. The way for you to do the operation is to supply tugs with an efficient crew." Therefore it seems to me that, with regard to the operation, the defendants have undertaken to each and every one of the vessels that is being towed up, that they will manage that towage properly.

I do not say that they warrant, in spite of everything, that they will be able to tow these vessels up on the one tide,

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because there might be a storm, or something might fall across the river so as to break down its banks. For such things they would not be responsible; but as to the efficiency of the tugs to perform the whole operation, it seems to me that they have at least this duty, that they will take every reasonable precaution that these tugs should be efficient; and that is their undertaking to each owner of each vessel that is being towed up. As, therefore, they have the power and the duty of deciding which shall be the first vessel of the row of vessels going up, and as they have the power of putting whichever vessel they think right first, and of putting to that vessel a tug, it is part of the duty which they owe to the hinder vessels, and to each of them, that they shall take reasonable care that the first vessel has a tug efficient to take her along so as not to stop the others, and thereby of necessity bring them down on the ground. It is not a duty they owe only to the first vessel, but to each and every one of the vessels, that the first vessel shall be so conducted as not to stop the others. At all events, they should take great care that the tug which is put at the head of the line is an efficient tug.

How does the evidence stand in this case? The evidence is that they put the tug *Vixen* at the head of the line, and that tug so behaved herself that she could not do the work in the ordinary time—she took an hour to do that which ought to have been done in half that time, and that was the cause of the injury to the present plaintiff. Is not this fact, that that tug so behaved, evidence that she was inefficient? In my opinion, it is evidence that she was inefficient, and that unless there can be some reason given by those who supplied her, it is they who must be responsible for her being supplied inefficiently. It fell upon them, therefore, to shew that something happened in spite of every care which they ought to have taken. They did not call any evidence. The plaintiff, when a difficulty arose in the conduct of the case—not in the conduct of the navigation—called the captain of that tug. The plaintiff did not call him to prove his own case—that was sufficient, in my opinion, as a primâ facie case without—but, being put into difficulty by the observations of the learned judge, the plaintiff

said, "Very well, I will call the master of the *Vixen*, who will then have an opportunity of shewing, if he can, how it was or why it was, or that something extraordinary happened which accounted for the slowing of the tug on that morning." He was called, but it turned out that he could prove nothing. After the plaintiff had thus given an opportunity to the defendants of proving something out of the mouth of the master of the tug, and proving it in the easiest way for themselves, namely, by cross-examining him, counsel for the plaintiff called the attention of the defendants to the fact that there were two other witnesses there whom they might call, and the defendants did not call them, but left the case without any cause that anybody can fix upon for that tug behaving on that morning as if she were an inefficient tug. That was strong evidence to my mind, and unless it is explained away it was conclusive evidence, that that tug was inefficient. It is said, "You cannot shew that the hull of that tug was inefficient; you cannot shew that her engines were inefficient; you cannot shew that her crew were inefficient. It may be they were careless." If their carelessness would be a defence, which I do not admit, then they ought to have shewn that their crew were careless; that they were a crew they were justified in trusting, but that on that particular occasion they misbehaved themselves. They did nothing of the kind; they did not explain away the fact that that tug, either by herself or her crew, was inefficient, and they did not shew that, when they supplied that tug on that day to perform part of that operation, any person on their behalf had taken the trouble to see whether that tug was efficient or not. It was the duty of the defendants, in my opinion, to each of the ships they were going to tow up, to have had some one to see that the tug they put at the head of the line was in an efficient condition; and if they did not do that they ran the risk, and must be liable for the consequences.

I, therefore, put this case on the ground that they owed that duty to each of these vessels. They were paid for that duty, and they were bound to see that the operation was properly conducted. There is evidence to shew that it was not properly

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or efficiently conducted, and that threw the burden upon the defendants to shew that they had taken every reasonable precaution to prevent a breakdown. Under that burden they fail; and therefore judgment must go against them, and they must be made liable to the plaintiff for what happened.

LOPES L.J. The Ribble is a very narrow river, and vessels cannot pass each other. The defendants, therefore, the corporation of Preston, by their harbour-master, arrange what the towage of vessels is to be in this river, and they generally arrange it thus: they send up a string of vessels, one vessel after another, and each vessel has its separate tug. The vessels have to be sent up at such a time as to catch the tide at a certain place, and if they are not in time to catch the tide at that particular place the chances are they ground. Navigation, therefore, is no doubt difficult. In such circumstances, we have to consider what the defendants, the corporation, really undertook in this case.

In my judgment, they undertook to arrange the towage of these vessels in such a way that there should be no obstruction of the waterway, as the vessels go up, which would prevent the vessels, or any one of them, reaching Preston on the turn of the tide, and in proper time, each vessel having its own tug. It is obvious, therefore, that if the tug of the leading vessel is inefficient, either in construction or in equipment or in management, that would be an obstruction which would prevent the passage of the vessels behind her. I do not say that there is any warranty on the part of the defendants, but I think they do undertake that they will use reasonable care in the case of each vessel that there shall be a tug efficient in hull, in equipment, and in crew.

Now, in this particular case, it is admitted that the tug of the leading vessel, the *Vixen*, could not do its work. The cause is unexplained, but that it could not do its work is beyond all doubt. I think, directly you get that fact, you get primâ facie evidence against the defendants—evidence that they might and could displace if they were in a position to do it. Now, here, I think, they were in a position to have done it if they

had been able. There was no necessity for the plaintiff doing so, but he did call the master of the tug, and gave an opportunity to the defendants to cross-examine him and to elicit anything as to the cause of the *Vixen* not being able to do her duty. There is also this remarkable fact, that there were two other witnesses present, one the engineer, the other the stoker, on board the *Vixen*. They were present and might have been called. The defendants did not call them, although they were challenged to do so. Therefore you get a primâ facie case of want of reasonable care on the part of the defendants in respect of that which, in my judgment, they undertook, and which is not explained or accounted for by the evidence.

The defendants do account for some things. They gave evidence that the *Vixen* was well constructed, and in many respects fit and proper for the work which she was selected to do, but there is no evidence with regard to her having been properly stoked, or being properly efficient on this occasion. Counsel for the defendants contended that those on board the *Vixen* were not the servants of the defendants at the time, and that, even if they were not competent and did mismanage things, the defendants were not liable. It was further contended that the tug herself was not the property of the defendants, as they had hired it, and that, therefore, those on board the tug were not the servants of the defendants at all. I cannot think that that view can be entertained. Surely, when they hired the tug they hired the crew, and paid not only for the tug but for the crew; and what use could the tug be to the defendants unless there was a crew on board?

In my opinion, the crew of the tug were as much the servants of the defendants, at the particular time during which the hiring held good, as if the tug had belonged to the defendants themselves, and the crew had been actually, not only for the time, but permanently, in their employ. I come, therefore, to the conclusion that in this case the defendants are liable; that the fact of the mischief occurring is primâ facie evidence against them; that the cause of that mischief is not explained by them; and that the decision of the learned judge below was erroneous.

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CHITTY L.J. The case against the defendants cannot be rested upon any warranty on their part, but it is one of contract, and the question is, What is the nature of the duties the contract imposed upon them?

In my opinion, in conducting this towage operation, it was the duty of the defendants to take all proper and reasonable measures to ensure that the vessel should be safely towed up on the occasion in question. The cause of the plaintiff's ship taking the ground was that the *Vixen*, which was the foremost tug, took an hour in which to do that which she ordinarily, if speed had been maintained, would have done in thirty-five minutes. The duty of the defendants was not a single duty to the plaintiff: it was a duty to all those who were going up in the string. The defendants had the control and the direction of the towage. The defendants in this case claim the right to supply the tugs. That right was not denied, and thus they had the right to impose the tugs and towage generally upon all the ships, and, as has been already explained, the duty was not a mere separate duty to each ship, but a common duty to all the ships which had to go up necessarily in this string.

Now it is said that there was no evidence to shew that the tug was inefficient for the purpose. In my opinion, there is a primâ facie case made against the tug, and therefore against the defendants, by reason of her slowing down as she did in the manner described and admitted. The defendants might have given some explanation why that occurred. I shall not go through the various points on the evidence which have already been dealt with, but content myself with expressing my opinion that the defendants had an opportunity of giving an explanation to shew that the breaking down of the leading tug was due to some extraordinary circumstances in respect of which it might be unreasonable to say that they had contracted, and that they failed to give any satisfactory explanation. As to what the defendants did, that has already been stated by the Master of the Rolls, and it is by no means an unimportant circumstance that the defendants did not take the ordinary precaution of examining the engines of the *Vixen* and seeing that she was in proper trim before she started. With regard to the point

made, dissevering the crew from the tug itself, as between the plaintiff and the defendants, that point cannot be maintained. In my opinion there has been a breach of duty established against the defendants, for which they must be held responsible.

Appeal allowed.

Judgment for plaintiff, subject to a reference.

March 29. *F. Laing* moved, on behalf of the defendants, for a stay of execution pending an appeal to the House of Lords.

From the affidavit filed in support it appeared that the plaintiff, suing on behalf of himself and the other owners of the *Ratata*, was a foreigner resident in Norway, and, upon the institution of the action, he was ordered to give security for costs, which he did by depositing in Lloyd's Bank, in the joint names of the solicitors on each side, the sum of 350*l.*; and after judgment had been entered for the defendants in the Court below, 308*l.* 13*s.* 10*d.* of this sum was paid over to the defendants for their taxed costs and interest, and the balance was paid over to the plaintiff's solicitors.

The defendants were willing that the plaintiff should proceed to a reference, and were willing to pay the damages, when assessed, into court. They were also ready and willing to return the costs paid to them by the plaintiff, and to pay his taxed costs, which would probably amount to about 450*l.*, on the plaintiff's solicitors undertaking to return them in the event of the intended appeal by the defendants being successful; but the plaintiff required the repayment of the sum of 308*l.* 13*s.* 10*d.* without such undertaking. The result would be that the original security deposited by the plaintiff being no longer available, the defendants ran the risk of losing all benefit from the intended appeal if successful.

[Counsel referred to the cases of *Wilson* v. *Church* (1), *The Khedive* (2), and *The Annot Lyle* (3), as establishing a precedent for the order asked for.]

H. Stokes, for the plaintiff. All that the plaintiff requires

(1) (1879) 12 Ch. D. 454. (2) (1879) 5 P. D. 1.

(3) (1886) 11 P. D. 114.

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from the defendants is the return of the sum of 308*l.* 13*s.* 10*d.*, being the costs which it turns out, owing to the reversal by this Court of the decision in the Court below, were improperly paid over to the defendants.

LORD ESHER M.R. The authorities cited do not affect the question, as it is a pure matter of discretion, depending on the particular circumstances of each case. The justice of this case, under the special circumstances set out in the affidavit, will be met by an order that, unless the solicitors for the plaintiff undertake to return the costs received, or to be received, by them from the defendants in the event of their appeal to the House of Lords being successful, or upon payment into court by the defendants of the amount of such costs, all proceedings herein be stayed pending the said appeal. The costs of this application must be paid by the defendants.

LOPES and CHITTY L.JJ. concurred.

Solicitors for appellant (plaintiff): *Stokes & Stokes.*

Solicitors for respondents (defendants): *Bird & Hamer, for H. Hamer, Town Clerk, Preston.*

T. L. M.

THE DUNBETH.

1897
April 7.

Admiralty—Charterparty—Bill of Lading—Damage to Cargo—Liberty to fill up for Steamer's Benefit—Deviation.

By charterparty the defendants' vessel was to load a cargo of wheat at Marianople for Gibraltar for orders for a port in the United Kingdom or on the Continent between Havre and Hamburg, the master of the vessel, to avoid being frozen in at the port of loading, to be "at liberty to leave . . . . with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azoff or Mediterranean port for United Kingdom, Continent or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded . . . ."

The master, under this liberty, left Marianople with part of the cargo of wheat, and proceeded to Novorossisk, where he filled up for steamer's benefit with linseed. At Gibraltar he was ordered to deliver the wheat at Cardiff; but he first proceeded to King's Lynn, and there discharged the linseed. On the way between King's Lynn and Cardiff the wheat was damaged by fire. The plaintiffs, who were holders of the bill of lading incorporating the conditions of the charterparty, sued the defendants for the damage:—

Held, by Gorell Barnes J., that the defendants were liable as, between King's Lynn and Cardiff, they had become insurers of the consignees of the wheat, for, though the usual exceptions in the bill of lading and charterparty would have covered the loss if it had occurred in the ordinary course of the voyage, the defendants were not entitled to deviate by taking the wheat round by King's Lynn, and could only discharge the linseed at a port on the way.

Action, by cargo owners against shipowners, for damages for breach of contract by deviation. (1)

By charterparty, dated November 20, 1895, between the firm of Samuel & Friedeberg, charterers, and the defendants, owners of the steamship *Dunbeth*, it was agreed that the vessel should proceed to Marianople and there load a cargo of not exceeding 13,200 quarters of wheat for a safe port in the United Kingdom or on the Continent between Havre and Hamburg as ordered at Gibraltar. "Should frost ensue . . . . after the

(1) An alternative claim for breach of contract in not safeguarding the interests of the plaintiffs against the consequences of deviation does not call for report.

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steamer has arrived at port of loading, and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave . . . . with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azoff or Mediterranean port for United Kingdom, Continent or Mediterranean; but, in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded, or shall forward such part cargo to its destination, provided that no extra expense be thereby caused to the receivers, freight being paid on quantity delivered under this charter."

Whilst the loading of the cargo was proceeding a frost set in, and the master of the *Dunbeth* left Marianople with a part cargo only, namely, 12,000 chetwerts of wheat in bulk, shipped by Samuel & Friedeberg for Gibraltar for orders under a bill of lading, dated November 30, 1895, incorporating all the conditions and exceptions of the charterparty, and containing the usual exceptions as to perils of the sea and fire, besides giving "liberty to call at any ports on the way for coaling or other necessary purposes."

The master of the *Dunbeth* proceeded to Novorossisk, and there, for the steamer's benefit, filled up with a parcel of linseed to be carried to King's Lynn. After putting into Algiers for coal, the vessel arrived on December 23 at Gibraltar, where orders were given for Cardiff as the port of discharge of the wheat; but the master first proceeded to King's Lynn, which he reached on January 3, 1896. Here the linseed which had been stowed over the wheat in Nos. 1 and 2 of the four holds was discharged in good condition, and there was no appearance of any damage to the wheat; but, on the hatches being opened when the vessel arrived at Cardiff, part of the wheat in No. 1 hold was found to be on fire, and that in No. 2 hold tainted by smoke, the total damage according to the particulars amounting to 1379*l.* 4*s.* 10*d.*

At the trial the defendants abandoned the defences set up in the pleadings of inherent vice and sea damage, and the plaintiffs, to whom the bill of lading had been indorsed, and to whom the property in the wheat had passed, admitted that, apart from the question of deviation, the damage was covered

by the exceptions contained in the bill of lading and charterparty.

Sir Walter Phillimore and *T. G. Carver*, for the plaintiffs. By deviating from the route between Gibraltar and Cardiff the shipowners became insurers of the cargo, for, although the clause in the charterparty gave liberty to fill up elsewhere than at the loading port of the wheat, the ship must after so filling up complete the original voyage.

Joseph Walton, Q.C., *Boyd, Q.C.*, and *Maurice Hill*, for the defendants. The right the charterparty gave the master of leaving the loading port with part cargo, and filling up elsewhere, for steamer's benefit, was a liberty to deviate, and, in fact, gave liberty to load a part cargo upon a different voyage to that upon which the original cargo was loaded. The parcel of linseed shipped in this way would, of necessity, be stowed above the wheat, and it would, therefore, be within the intention of the clause, and obviously convenient, to discharge it first.

[Reference was made to the cases of *Serraino* v. *Campbell* (1) and *Glynn* v. *Margetson*. (2)]

Sir Walter Phillimore, in reply.

GORELL BARNES J. The first point to consider is whether there was a deviation by the *Dunbeth* going round by King's Lynn. If there was no deviation, it is not disputed that the exceptions in the contract would exonerate the defendants from liability. If, on the other hand, there was a deviation under the contract of carriage, then the owners of the ship would practically become insurers of the consignees, and responsible for this damage which occurred at King's Lynn or between King's Lynn and Cardiff.

Now the question, whether or not there was a deviation, depends upon the construction of the contract of carriage. The point made for the plaintiffs is that according to the bill of lading the ship had to proceed to Gibraltar for orders, and from thence to her port of discharge, and that although, under the provisions in the charterparty, she was entitled to take in some

(1) [1891] 1 Q. B. 283. (2) [1893] A. C. 351.

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extra cargo if the wheat did not fill her, yet that she was not entitled to take the wheat round by King's Lynn, that is to say, it is admitted that the master was entitled to fill up with the linseed; but after he had so filled up he was not entitled to proceed beyond the port for which the wheat was destined. On the other hand, the defendants contend that the clause entitled the master to fill up the empty space at the port at which he did fill it up, and that then, having filled it up, he was entitled to proceed to any port or ports in the United Kingdom, Continent, or Mediterranean—wherever those ports might be situated, and that in going to King's Lynn he did nothing more than exercise his right under that liberty.

I have come to the conclusion that this was a deviation, because, although the clause about liberty to fill up is incorporated in the bill of lading by the express reference to the charterparty, yet when even the terms of the charterparty alone are considered, and certainly when the terms of the charterparty in relation to the terms of the bill of lading are considered, I think that this deviation was not within the terms of the liberty to deviate. First of all, as a matter of construction, it is obvious that where the contract provides that the carrier shall carry goods from A to B, A being the port at which the ship loaded, if the shipowners deviate they must shew that they have deviated within the terms of the clause, and as the power to deviate is an exception in their favour, it seems to me that the burden of shewing they are within that exception rests with the shipowners. That is the ordinary principle of construction of exceptions upon a shipowner's contract; in other words, the construction of an exception is most strongly against the person in whose favour it is inserted. Here the ship had power to fill up with part cargo at any open Black Sea, Azoff, or Mediterranean port. All those ports are practically ports which would be on the way of the ship from her loading port to Cardiff. Then she may load that extra cargo for the United Kingdom, Continent, or Mediterranean. The owners are limited to those countries in taking this extra cargo on board, so that, as suggested by counsel for the plaintiffs, the shipowners are practically prevented from doing what

they might do if there was not that limitation which is in favour of the shipper of the cargo. But I am inclined to go a little further in limiting the clause. I cannot think that it ought to be construed so as to allow the steamer which is taking advantage of that clause to depart to an unreasonable extent from the voyage on which the goods to which the contract relates have to be carried. In this case the vessel went to King's Lynn; if the defendants' contention be right, she might equally well have gone to St. Petersburg or Dundee, or even to the White Sea. There seems to be no limit in those words, unless they are to be limited in some reasonable way. It is proposed by counsel for the plaintiffs to limit them in the way which will have, as it seems to me, a fair meaning, having regard to the terms of the bill of lading—that is, that although the extra cargo may be taken on board from those ports in those countries indicated, and may be delivered at ports in the named countries, those ports must be in the reasonable sense—in the business sense—on the way from the port at which the original cargo is taken under the contract with the shipper to the port at which it is to be discharged. But there is a further part of the language of this clause which favours the view contended for by the plaintiffs, and that is the words, "in case of leaving with a part cargo the steamer shall complete the voyage as if a full cargo had been loaded." I read those words to mean that after she has taken on board the cargo which she is allowed to take for steamer's benefit, she must then complete her voyage, as if she had originally started with a full cargo, and go direct to the place of discharge, except, possibly, that if she has taken extra cargo for intermediate ports, she may take that cargo and deliver it at those intermediate ports. That seems to me the only way in which this clause can be reasonably read.

As to the second point: [The learned judge then dealt with the alternative claim of the plaintiffs, namely, that the defendants had undertaken to safeguard their interests against the consequences of deviation, and came to the conclusion on the correspondence that the defendants had also committed a breach of contract in that respect, and continued:—]

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My judgment must, therefore, be for the plaintiffs with costs. The amount of the damages will be referred, if disputed, to the registrar and merchants.

Solicitors for plaintiffs: *Vachell & Co., Cardiff.*
Solicitors for defendants: *Downing & Handcock, Cardiff.*

T. L. M.

C. A.

1897

March 10, 11; *April* 14.

April 7, 14.

[IN THE COURT OF APPEAL.]

BISHOP *v.* BISHOP. JUDKINS *v.* JUDKINS.

Husband and Wife—Separation Deed—Allowance for Wife's Maintenance—Subsequent Alteration of Circumstances—Dissolution of Marriage—Judicial Separation—Alimony—Maintenance and Education of Children—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 32, 35—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *ss.* 4, 5—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1.

Notwithstanding that by an agreement for separation, made between a husband and wife on withdrawal of the wife's petition for divorce, the wife has agreed to accept from the husband a specified sum for maintenance, to be paid in any event whether the marriage should thereafter be dissolved or not, the Court has power under the Divorce Acts, after a decree for dissolution on a fresh petition by the wife based on misconduct of the husband since the agreement, to disregard the agreement and order permanent alimony to be paid to her at a rate exceeding the amount specified in the agreement, if the husband's means on inquiry permit: at all events, if the agreement does not contain an express covenant by the wife not to sue for increased alimony in the event of a divorce grounded on future misconduct of the husband. But whether such a covenant is valid, quære.

Again, when by a separation deed the wife has agreed to accept a specified sum for maintenance, the deed to become void if the marriage is afterwards "dissolved" for any future misconduct by either party, the Court has a similar power to order the payment of permanent alimony to the wife after a decree for judicial separation by reason of the husband's misconduct since the execution of the deed, if there has been such an alteration of circumstances as renders it unjust that the wife should be bound by the deed.

The statutory power of the Court in relation to the maintenance and

education of children after a decree for judicial separation or for dissolution of marriage is not affected by any previous agreement between the parents.

Gandy v. *Gandy*, (1882) 7 P. D. 168; (1885) 30 Ch. D. 57, considered and explained.

BISHOP *v.* BISHOP.

On December 22, 1892, Edith Bishop filed a petition against her husband, Walter Harry Bishop, a furniture warehouseman, for dissolution of marriage on the ground of his alleged adultery and cruelty.

On March 20, 1894, the petition came into the paper for hearing; but before it was called on the parties signed the following agreement:—

"*Bishop* v. *Bishop*.

"The petitioner agrees to accept £130 per annum by way of permanent maintenance, this sum to include the maintenance of the child. The said allowance to be paid by Mr. Walter Harry Bishop, the respondent, by monthly payments during their joint lives. This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved. Mrs. Edith Bishop, the petitioner, is to have the custody of the child.

"Dated 20 March, 1894.

"(Signed) Edith Bishop.
"Walter Harry Bishop."

The petition was then, by consent, dismissed. There had been only one child of the marriage, a daughter, then about fourteen months old.

On May 22, 1894, Mrs. Bishop presented a petition for restitution of conjugal rights, and on December 10, 1894, a decree to that effect was pronounced, but the husband refused to comply with it.

In June, 1895, it came to the knowledge of the wife that the husband had committed fresh acts of adultery in 1893 and 1894, that is, since the presentation of the first petition, and thereupon, on July 17, 1894, she filed a petition for dissolution of marriage on the ground of that adultery coupled with desertion.

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On November 19, 1895, she obtained a decree nisi which was made absolute on June 8, 1896, and the custody of the child was given to her.

On August 5, 1896, she filed the present petition praying for an order that her husband should pay or secure to her such gross sum of money or such annual or monthly or weekly sum of money for her permanent maintenance as to the Court should seem meet; and further for an order that the husband should make such provision for the maintenance and education of the child of the marriage as the Court might think reasonable.

In an affidavit in answer to the petition, the husband pleaded the agreement of March 20, 1894, and expressed his willingness to consent to an order being made against him for payment of 130*l.* per annum for the maintenance of his wife and child pursuant to that agreement. The wife, however, filed an affidavit in reply, stating that the 130*l.* per annum under the agreement of March 20, 1894, was the amount assessed as alimony pendente lite in the first suit, and was in no way proportionate to her husband's present income; and, moreover, that it was assessed at a time when she had a small separate income of her own, and when her child was of such very tender age that the question of her education had not arisen at all, and when the cost of her maintenance was not so serious an item as at present. The petition was referred to the registrar, who, on December 28, 1896, made a report in which, after stating the agreement and the circumstances under which it was made, he said: "The plaintiff asks for a further maintenance beyond that which is stipulated for by the agreement, but it appears to me that by the terms of the agreement she is not entitled to any further maintenance. It is submitted that the petition for maintenance should be dismissed."

The wife thereupon served the husband with notice of motion to vary that report, and to carry out the prayer of the petition.

The motion was argued before the President on January 25, and 26, 1897.

H. Durley Grazebrook, for the wife.

W. T. Barnard, for the husband.

The cases relied upon in argument are referred to in the considered judgment of the President.

1897. Feb. 8. SIR F. H. JEUNE, PRESIDENT (after stating the facts). The learned registrar, conceiving himself to be bound by the case of *Gandy* v. *Gandy* (1), submits that Mrs. Bishop's petition for permanent maintenance must fail. It is necessary, therefore, to consider what it was that the case of *Gandy* v. *Gandy* (1) did and did not decide.

Before that case there are undoubtedly one, if not more, authorities which, unless they are overruled, govern the present. *Morrall* v. *Morrall* (2) is, I think, in point. There, a husband in a deed of separation agreed to secure to his wife 30*l.* a year, and assign to her 130*l.* besides certain goods and chattels, and the wife covenanted that she would not at any time thereafter commence or prosecute any suit or other proceeding for compelling her husband to allow her "any support, maintenance, or alimony whatsoever," except the sum covenanted to be paid, and the production of the deed was to be a bar to any action or suit or other proceeding in respect thereof. The husband was guilty of incestuous adultery, and the wife obtained a decree for dissolution of her marriage. Sir James Hannen's judgment is as follows: "In this case a state of facts is proved to exist which was not in the contemplation of the parties when the agreement was executed. By that agreement the wife was to live separate from her husband by reason of differences having existed between them. It was not a licence to the husband to commit adultery, incestuous or otherwise, but merely an arrangement for living apart, and while it continued she was entitled to no more than what was stipulated for in the deed. But when she has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Circumstances may justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them to an allowance based upon her husband's actual income."

(1) 7 P. D. 168. (2) (1881) 6 P. D. 98.

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I quote these words at length, because they express Sir James Hannen's settled opinion, which also finds expression in other cases. It will be observed that the wife covenanted not to seek further "support, maintenance, or alimony," words clearly pointing to three possible relations in future among the parties—separation, a divorce, or a judicial separation. But Sir James Hannen did not consider the deed to be a licence to the husband to commit adultery, but to be an agreement based on the condition of separation between the parties, and not restraining the wife when her right to a dissolution of her marriage was established, and so a state of things not in contemplation when the deed was executed arose. On this ground, as Sir James Hannen afterwards stated in *Gandy* v. *Gandy* (1), his opinion was based, and not on the change of status of the parties, nor, it may be added, on the power of the Court to vary any ante-nuptial or post-nuptial settlement.

Sir James Hannen had expressed substantially the same opinion in at least two previous cases: *Brown* v. *Brown and Shelton* (2) and *Benyon* v. *Benyon*. (3) In the former of these cases a husband and a wife were living apart under a deed of separation, the husband securing an allowance to the wife. The husband petitioned for a decree by reason of the adultery of the wife, who recriminated with a charge of cruelty before the separation. The husband failed to prove the adultery of the wife, but the wife proved cruelty against the husband, and claimed a judicial separation. Sir James Hannen granted the separation on the ground, as he afterwards explained in *Gandy* v. *Gandy* (4), that the husband's misconduct in bringing false charges against his wife caused him to lose his right to restrain her from asking for a decree of judicial separation upon the facts she had proved in answer to his charge, and that so she became entitled to claim judicial separation, and with it all rights under such a decree. In *Benyon* v. *Benyon* (3) the husband had accepted an allowance from the wife under a deed of separation. He subsequently obtained a divorce for the adultery of his wife, and claimed a larger income than was

(1) 7 P. D. 77, 82.
(2) (1874) L. R. 3 P. & M. 202.
(3) (1876) 1 P. D. 447.
(4) 7 P. D. 77, 80.

given by the deed of separation. Sir James Hannen held that he was not precluded from making his claim by reason of his acceptance of an allowance under the deed of separation, that the condition of things was altered by the wife being guilty of conduct which entitled him to have the marriage dissolved, and that "it would be of evil example and morally dangerous if his wife's pecuniary position could not be altered by reason of her adultery subsequent to her husband's acceptance of an allowance." It will be observed that there was not in these two cases, as there was in *Morrall* v. *Morrall* (1), any covenant in terms not to sue for further alimony or maintenance; but the reasoning of Sir James Hannen in no way turned on the presence or absence of such a covenant.

When the case of *Gandy* v. *Gandy* (2) came before him, Sir James Hannen reiterated the opinion expressed in the above cases. In that case there was a deed of separation by which trustees covenanted on behalf of the wife that she would not thereafter commence any suit or proceedings to compel her husband to allow her further support or alimony than the allowance provided by the deed. The husband committed adultery, and the wife, after obtaining a decree of judicial separation, claimed an order for permanent alimony. Sir James Hannen held that adultery of the husband gave the wife the power to proceed, inasmuch as that adultery might be regarded either as creating a state of facts not contemplated by the deed, or as misconduct in the husband disentitling him to have the restraining provision of the deed enforced. The learned judge after much consideration reasserted his opinion that to adopt the opposite conclusion would lead to results in a high degree prejudicial to morality, inasmuch as if a husband could insist on the deed, he would obtain a licence to commit adultery without subjecting himself to any penalties beyond those imposed by the deed.

This judgment was reversed by the Court of Appeal. It was urged before me, and appears to be the case from the subsequent proceedings in this Court (which have been investigated), and indeed from the report of the case in the Court of Appeal,

(1) 6 P. D. 98. (2) 7 P. D. 77.

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that that decision was given under a misapprehension of the effect of a portion of the deed, and by a subsequent decision of the same tribunal—*Gandy* v. *Gandy* (1)—was practically set aside. But I do not think that I am at liberty on this ground to disregard the reasons which the Court of Appeal gave for reversing the judgment of Sir James Hannen. But what were those reasons? They turned on the difference between the power of the Court in judicial separation and in dissolution of marriage. The late Master of the Rolls, who in a previous case of *Besant* v. *Wood* (2) had expressed his disagreement with the decision in *Brown* v. *Brown and Shelton* (3), repeated his opinion that public policy should not be invoked, inasmuch as difference of opinion existed about it among different people and at different times. He rejected the view that the misconduct of the husband so affected the position of the wife as to entitle her to repudiate the contract, and held, therefore, that the Court could not interfere with the contract in a case of judicial separation, because its powers would be confined to increasing the allowance to the wife, and it could not, as in the case of dissolution of marriage it could, set aside the contract and allot what alimony might be just. The view of Lindley L.J. seems to me even clearer in the same direction. His Lordship, without expressing any disapproval of the case of *Morrall* v. *Morrall* (4), distinguished it on the ground that the Court had not the same powers in judicial separation as in dissolution of marriage. I think also that the observations of Cotton L.J. with regard to *Morrall* v. *Morrall* (4) and the distinction he drew in the case of incestuous adultery may be fairly understood as supporting the same view, because incestuous adultery gives the wife the right to claim, not a judicial separation only, but a dissolution of marriage.

It is not necessary to express any opinion with regard to *Gandy* v. *Gandy* (5) in the Court of Appeal, regarded as a decision in reference to a case in which a judicial separation only is pronounced. But when the decree is one of divorce, that authority

(1) 30 Ch. D. 57.
(2) (1879) 12 Ch. D. 605.
(3) L. R. 3 P. & M. 202.
(4) 6 P. D. 98.
(5) 7 P. D. 168.

appears to me not to reverse, but to approve, the decision in *Morrall* v. *Morrall* (1), and to lay down that, inasmuch as the Court on a dissolution of marriage has power to vary post-nuptial as well as ante-nuptial settlements, it can set aside any previous agreement of the parties for the allowance to the wife, and do complete justice in the matter.

I will only add, without referring to any considerations of public policy, that it appears to me legitimate to consider that the wide powers given by the Legislature to vary settlements on a dissolution of marriage could never have been intended to be inapplicable to arrangements between the parties purporting to determine the amounts to be paid by one to the other in case of the proved adultery of either. No one with any experience of divorce proceedings can be unaware how closely such arrangements are often connected, I do not say with the commission of misconduct, but with the prosecution of, and the defence of, or absence of defence to, divorce proceedings.

There is another and narrower ground on which I think the wife is in this case entitled to ask for an increased provision. The agreement provides only for the maintenance, and not for the education of the child of the marriage, and, according to the principles indicated in the second case of *Gandy* v. *Gandy* (2) in the Court of Appeal, this entitles the wife to seek the aid of the Court. But I prefer to rest my judgment on the wider ground which I have indicated.

I think, therefore, that the inquiry as to the means of the respondent should proceed. The petitioner will have her costs of this application and her costs up to date.

[The learned judge accordingly made an order that the registrar's report should be set aside, and that the inquiry as to the means of the husband should proceed; and for costs as above mentioned.]

W. J. B.

Mr. Bishop appealed from the above order, leave to appeal,

(1) 6 P. D. 98. (2) 30 Ch. D. 57.

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except as to the costs directed by the order, having been granted by the learned President on February 15, 1897.

The appeal was heard on March 10 and 11, 1897.

W. Willis, Q.C., and *W. T. Barnard*, for the appellant, Mr. Bishop. An agreement between husband and wife for a future separation was no doubt void at law, as was also an agreement to facilitate a divorce. But an agreement for a present separation is valid, and in such an agreement the parties may stipulate as to the payment by the husband of an allowance to the wife for the future, and under any circumstances. The agreement entered into in the present case was perfectly lawful, and the decision of the Court of Appeal in *Gandy* v. *Gandy* (1) shews that the subsequent conduct of the husband is no bar to his insisting upon the agreement. At any rate the agreement cannot be disregarded, unless the husband has been guilty of much grosser misconduct, such as incestuous adultery, as in *Morrall* v. *Morrall*. (2) The subsequent decision of the Court of Appeal in *Gandy* v. *Gandy* (3) is in no way inconsistent with their first decision. The husband had himself disregarded the provisions of the deed by not maintaining the younger daughters. But the Court were clearly of opinion that the adultery of the husband was not a breach of any implied condition in the deed. *Morrall* v. *Morrall* (2) and similar cases are not consistent with *Gandy* v. *Gandy*. (1) The power given to the Court by 22 & 23 Vict. c. 61, s. 5, after a decree for dissolution of marriage to inquire into the existence of "ante-nuptial or post-nuptial settlements," and to "make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit," must apply only to a settlement of some tangible property. A covenant to pay a sum of money at a future time is not "property settled" within the meaning of that section. Nor is this agreement a "settlement" within the section; it is only an agreement to accept an order in a suit.

(1) 7 P. D. 168. (2) 6 P. D. 98.

(3) 30 Ch. D. 57.

Again, the "property" to be dealt with under the section must be money paid to or settled upon a woman in her character of "wife" and whilst she continues a "wife": *Worsley* v. *Worsley* (1): see also *Maudslay* v. *Maudslay*. (2) Here it is sought to deal with a sum payable to a woman who is no longer a wife.

The Court ought not to interfere with an agreement made between husband and wife unless there has been such misconduct on the part of the husband as disentitles him to rely on the agreement, as in *Morrall* v. *Morrall* (3), or where it was entered into upon a state of facts not in the contemplation of the parties at the time: *Gandy* v. *Gandy* (4); *Brown* v. *Brown and Shelton*. (5) Here a possible dissolution of the marriage was expressly within the contemplation of the parties: therefore the Court had no jurisdiction to make the order it has made here, sending back the case under s. 1 of 29 Vict. c. 32, regardless of the agreement: and the subsequent adultery of the husband does not preclude him from enforcing the agreement. The principle that a wife has no authority to pledge her husband's credit if she has, on a separation, agreed to accept a certain maintenance, applies: for when the parties separate by mutual consent, they may make their own terms, and so long as they continue the separation the terms are binding on both: *Eastland* v. *Burchell*. (6) So here, there is an implied agreement by the wife not to ask for any further maintenance beyond what is expressly agreed. It must now be considered as settled that a separation deed is binding on the wife as well as on the husband: *Rose* v. *Rose*. (7) The learned President was wrong in saying in *Morrall* v. *Morrall* (8) that the covenant by the wife in the separation deed not to seek further "maintenance" contemplated a divorce. The form is in common use in separation deeds, where the parties certainly do not contemplate a divorce: Prideaux's Conveyancing Forms, 14th ed. vol. ii. p. 399.

(1) (1869) L. R. 1 P. & M. 648, 651.
(2) (1877) 2 P. D. 256, 262.
(3) 6 P. D. 98.
(4) 7 P. D. 77, 82.
(5) L. R. 3 P. & M. 202.
(6) (1878) 3 Q. B. D. 432, 436.
(7) (1883) 8 P. D. 98, 100.
(8) 30 Ch. D. 57.

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Bargrave Deane, Q.C., and *H. Durley Grazebook*, for the respondent, Mrs. Bishop. At the date of this agreement both petitioner and respondent were innocent parties: that is, neither had yet been proved guilty of misconduct. Thus it was an agreement between an innocent husband and wife. If, therefore, it was an agreement providing against future adultery, it was void as against public policy. In *Gandy* v. *Gandy* (1) there was a continuing adultery which commenced before the date of the deed, whereas here there was fresh adultery subsequent to the deed, and it was upon the ground of that fresh adultery that the decree for dissolution of marriage was granted. The only ground upon which this agreement can be sustained at all is that it is severable: that is to say, so far as it condones past offences it is valid, but so far as it condones future offences it is invalid: *Brunton* v. *Dixon*. (2) The effect of the agreement was to preclude the wife from suing on the ground of the husband's previous misconduct: *Rowley* v. *Rowley* (3); *Smyth* v. *Smyth*. (4) A deed of separation does not operate as an estoppel against the wife: *Matthews* v. *Matthews*. (5)

[LINDLEY L.J. There is no case of estoppel. The only question is whether, upon the construction of this agreement, the wife has agreed not to apply for further maintenance.]

There is no such unqualified acceptance by the wife of the maintenance provided by this agreement as precludes her from applying for alimony; and a court of equity would not restrain her by injunction from applying to the Divorce Court for that purpose: *Williams* v. *Baily*. (6) It is clear that a separation deed is not necessarily a bar to an increased allowance of alimony: *Powell* v. *Powell*. (7) In *Gandy* v. *Gandy* (8) the Court enforced the rights of the wife against the husband, notwithstanding the prior decision of the Divorce Court. It is clear that the Court may vary ante-nuptial and post-nuptial settlements in case of dissolution of marriage, but not in the

(1) 7 P. D. 168.
(2) W. N. (1892) 105.
(3) (1866) L. R. 1 H. L., Sc. 63.
(4) (1833) 4 Hagg. Ecc. 509.
(5) (1860) 3 Sw. & Tr. 161, 163.
(6) (1866) L. R. 2 Eq. 731.
(7) (1874) L. R. 3 P. & M. 186, 189.
(8) 30 Ch. D. 57.

case of judicial separation: *Gandy* v. *Gandy*. (1) The respondent relies upon there having been a new state of facts since the agreement—a state of facts upon which the wife has obtained a decree for dissolution of marriage. The wife accepted the 130*l.* a year merely as a minimum, and not as precluding her from asking for more if fresh circumstances arose. It must be remembered that there is also a child of the marriage; and in the interest of that child the Court should direct an inquiry as to the husband's means, under 22 & 23 Vict. c. 61, s. 5.

Willis, Q.C., in reply.

Cur. adv. vult.

JUDKINS *v.* JUDKINS.

Application by Florence Judkins, who had obtained a decree for a judicial separation from her husband, E. C. Judkins, for an order for the payment by him of permanent alimony and maintenance for the children of the marriage.

The application was refused by the registrar, and it was then referred to the judge.

In 1892 the wife presented a petition for dissolution of the marriage. Before, however, that petition had come on for hearing, a separation deed was executed between the parties. This deed bore date July 30, 1892. It contained recitals to the effect that there had been issue of the marriage two daughters, then aged respectively twelve and eleven; that it had been agreed that all further proceedings on the petition should be stayed, except an order to dismiss it; and that the covenants and agreements contained in the deed should be entered into. It was by the deed mutually agreed and the parties respectively covenanted to the following effect:—

(1.) That the parties should live apart.

(2.) That neither of them should molest the other of them, or compel or endeavour to compel the other to cohabit with him or her by any legal proceedings for restitution of conjugal rights or otherwise.

(3.) Neither of them should take any proceedings against the

(1) 7 P. D. 168, 172.

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other to obtain a divorce or judicial separation in respect of any misconduct before the date of the deed, and immediately after the execution of the deed all proceedings on the petition should be stayed, and the petition be dismissed by consent.

(4.) The two children should remain at the school at which they were, and the husband would pay their school bills.

(5.) The wife should have the custody and control of the children during the whole of the Easter holidays, and during one-half of the summer and Christmas holidays respectively; and the husband should have the custody and control of them during the remaining half of the summer and Christmas holidays respectively.

(7.) The husband would during the joint lives of himself and the wife, if she should continue to perform and observe the stipulations in the deed contained on her part, pay to her as from September 24, 1890, to the date of the deed the yearly sum of 200*l.*, and thenceforth from the date of the deed "will pay to her the yearly sum of 150*l.*, to be for her separate use without power of anticipation, and in addition to the provision to which she is entitled under her marriage settlement."

(8.) The wife "shall out of the provisions made for her by these presents, or by her said settlement or otherwise, provide and pay for all such necessary and other board and lodging, clothing, ornaments, medical attendance, comforts, recreations, and things whatsoever as she may now or hereafter require or obtain, and shall in all respects support and maintain herself, and shall pay and discharge all the debts, engagements, and liabilities which she may incur or enter into in respect of the matters aforesaid, or of any other matters, and shall indemnify" the husband in respect thereof.

(9.) The husband would, during the joint lives of himself and the wife, if the two children or either of them should be living and unmarried, and if the wife should so long perform and observe the stipulations on her part contained in the deed, pay to her the yearly sum of 15*l.* in respect of each of them who should for the time being be under the age of fifteen years, and such further yearly sum in addition to the 15*l.* a year as might hereafter be agreed upon in respect of each of them who should for

the time being be above the age of fifteen and under the age of twenty-one. The said yearly sums should from time to time as the same should be received be applied by the wife towards the clothing of the two children, and the wife should thereout and without any further assistance from the husband supply all articles necessary for clothing the two children in a suitable manner, and would indemnify the husband therefrom.

(13.) "If the said E. C. Judkins and Florence Judkins shall be reconciled to each other and return to cohabitation, or if their marriage shall be dissolved by a court of competent jurisdiction in respect of anything done, committed, or suffered by either party after the date of these presents, then, and in either of such cases, the covenants, agreements, and stipulations hereinbefore contained shall forthwith become wholly void, except as to any act or thing previously done thereunder, or as to any proceedings in respect of a breach thereof previously committed."

The deed did not contain any express covenant by the wife not to sue the husband for any further allowance or alimony than the 150*l.* a year.

On August 5, 1896, the wife obtained a decree for judicial separation on the ground of adultery by the husband since the date of the separation deed, and it was ordered that she should have the custody of both daughters until further order. A subsequent order was made that the elder daughter should spend part of her holidays with her father.

W. T. Barnard, for the wife.
J. C. Priestley, for the husband.

Cur. adv. vult.

1897. March 3. GORELL BARNES J. read the following judgment:—Before and at the time of the institution of this suit the petitioner and respondent were living apart on the terms of a deed of separation dated July 30, 1892. The suit was instituted by the wife against the husband for a judicial separation on the ground of his adultery since the date of the deed. The husband denied the charge, but at the trial before

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me it was proved that the respondent was guilty of the adultery charged, and on August 5, 1896, I pronounced a decree of judicial separation, and gave the custody of the children of the marriage to the petitioner. There are two children of the marriage, both girls, and as the eldest girl, who is seventeen years old, I believe, expressed a desire to spend part of her time with her father, an application was made to me to vary the order for custody, and after an interview with the young lady I made an order on December 17, 1896, that the order for custody should stand, but that she should spend the second half of her holidays with her father and the first half with the petitioner.

The petitioner afterwards applied for permanent alimony and maintenance for her children. The registrar, on January 19, 1897, dismissed the application owing to the case of *Gandy* v. *Gandy* (1), and on appeal to me in chambers I adjourned the summons into court in order that the question raised might be fully argued, it being agreed that, although no petition for permanent alimony or maintenance had been filed, the rights of the petitioner for herself and children should be determined on the merits.

The opposition to the petitioner's application is based upon the deed of separation, by the terms of which it is contended that the petitioner is debarred from claiming from the respondent anything except what is provided for therein. [The learned judge read the material clauses of the deed, and continued :—]

It will be observed that the deed contains no clause prohibiting the petitioner from commencing or prosecuting any suit or proceeding to compel the respondent to allow her further support or alimony based upon matters occurring after the date of the deed. The deed affords no answer to the suit for judicial separation. The petitioner has obtained her decree, and the Court has power by the statute 21 & 22 Vict. c. 85, s. 17, to make any order for alimony which shall be deemed just, and under s. 4 of 22 & 23 Vict. c. 61, combined with s. 35 of 21 & 22 Vict. c. 85, to make such orders and provisions with respect to

(1) 7 P. D. 77, 168.

the custody, maintenance, and education of the children as it may deem just and proper.

In the deed in *Gandy* v. *Gandy* (1) there was a covenant that the wife would not at any time after the deed of separation commence any suit or proceeding to compel the husband to allow her any further support or alimony beyond that provided for in the deed; but nevertheless Lord Hannen, in a very carefully considered judgment, held that the wife was entitled to file a petition for permanent alimony with the view of obtaining a larger amount than that named in the deed. He did so on the ground that the subsequent acts of the husband created a state of matters which was not in the contemplation of the parties when the deed was entered into, and that therefore the wife was no longer bound by it, or, putting it in another way, that the subsequent acts of the husband deprived him of the right to have the restraining provisions of the deed enforced. He had previously decided a similar point in the same way in the divorce suit of *Morrall* v. *Morrall* (2), and he considered that the reasons on which his judgment in that case rested were equally applicable to cases of judicial separation. The case was taken to the Court of Appeal, and heard on April 18, 1882. On the same day the Court reversed the judgment of Lord Hannen, on the ground that the covenant by the wife not to sue for increased alimony was binding on her, notwithstanding the subsequent adultery of her husband. The Court seem to have thought that, although s. 17 of 20 & 21 Vict. c. 85 empowers the Court to make any order for alimony which should be deemed just, it would not be just to allow increased alimony, because the Court could not reduce the alimony below that covenanted to be paid, if it thought less should be paid.

If this decision is to govern the present case, I am bound by it. The deed in that case contained a covenant by the husband to provide for the maintenance and education of his two youngest daughters, and provided that the wife should not have the custody of those daughters. In the suit for judicial separation Mrs. Gandy was given the custody of those daughters. The decision of the Court of Appeal proceeded on the footing

(1) 7 P. D. 168. (2) 6 P. D. 98.

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that Mr. Gandy continued liable under his covenant to pay the expenses of the maintenance and education of those children. The eldest of the daughters having attained the age of sixteen years, Mr. Gandy refused any longer to pay for her maintenance and education, on the ground that his covenant to do so had been put an end to by the custody of the youngest daughters being given to the wife. This was before *Thomasset* v. *Thomasset* (1) had finally decided that the Court had power to make orders respecting the custody, maintenance, and education of children till they attain the age of twenty-one years.

It is stated in the report of *Gandy* v. *Gandy* (2) that Mrs. Gandy then petitioned this Division that her husband might be ordered to pay her a proper sum for the maintenance and education of her two youngest children, and that Lord Hannen (I presume in consequence of the first decision of the Court of Appeal) considered that he had no jurisdiction to make the order asked for, and suggested that the proper remedy was to endeavour to enforce the father's covenant. I have not been able to trace exactly what occurred on this point from the minutes of the case; but a suit was commenced by the elder of the two youngest children, by her next friend, in the Chancery Division against Mr. Gandy, and the trustees of the deed who refused to sue, claiming, (1.) a declaration that Mr. Gandy was liable to pay to the trustees of the deed on behalf of the plaintiff all expenses connected with her maintenance, and an order for payment accordingly; (2.) execution of the trusts of the deed; (3.) an inquiry as to the amount expended by Mrs. Gandy for the plaintiff's maintenance from the date of her attaining sixteen years of age up to the institution of the suit.

Bacon V.-C., who heard the suit, decided in favour of the plaintiff. Mr. Gandy appealed to the Court of Appeal. After an objection that the plaintiff could not sue on the deed, Mrs. Gandy was added as a party and held entitled to sue. The case was then heard on the merits. The Court held that, in fixing the amount of alimony to a wife, the Court considers, not only what provision should be made for her, but what pro-

(1) [1894] P. 295. (2) 30 Ch. D. 57.

vision should be made for the maintenance of those children of whom the Court has said she is to have the custody and control; and they directed that Mrs. Gandy should therefore be allowed to make a fresh application to the Divorce Division for increased alimony, beyond the sum of 252*l.* covenanted to be paid by Mr. Gandy for herself and the elder children, and that in the meantime all further proceedings under the judgment of Bacon V.-C. should be stayed until further order. On reference to the minutes, I find that upon further application to this Division an inquiry as to the husband's means was held, and the registrar, on July 24, 1886, reported that the elder of the two youngest children attained the age of twenty years on November 2, 1885, and the younger the age of sixteen in February, 1886, and that the income of the respondent might be estimated at 4000*l.* a year, and on August 3, 1886, an order was made by the President allowing Mrs. Gandy permanent alimony at the rate of 750*l.* per annum until further order, credit to be given by the petitioner for the amount of the annual payment made to her by the respondent under the deed of separation, and for certain payments already made. I am informed that a final order was made on December 1, 1886, by the Court of Appeal staying the Chancery proceedings. The result of all this litigation in *Gandy* v. *Gandy* (1) was that the wife obtained about 500*l.* a year more than the deed gave her as permanent alimony. I cannot ascertain exactly how this increase was fixed; but it may have been in order to maintain the two youngest children. At the same time the final order does in terms give permanent alimony beyond that which was covenanted to be paid by the deed.

Lord Hannen in *Tress* v. *Tress* (2) is reported to have said that the authority of *Gandy* v. *Gandy* (1) was much shaken by what occurred when it came before the Court of Appeal, referring as I understand to what occurred in the Chancery proceedings. In the recent case of *Bishop* v. *Bishop* (3), the President, Sir Francis Jeune, said, referring to the first decision of the Court of Appeal in *Gandy* v. *Gandy* (1), that it was

(1) 7 P. D. 168. (2) (1887) 12 P. D. 128.
(3) Ante, p. 139.

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practically set aside by the second decision. (1) *Bishop* v. *Bishop* (2) was a divorce case similar to *Morrall* v. *Morrall*. (3) These cases are distinguishable from cases of judicial separation, because in the former the Court has express power to vary settlements, which may include deeds of separation, whereas it has not the same power in cases of the latter kind.

That being the state of the authorities, I have now to consider the present case. Both the children are under twenty-one years of age, and I have already given the custody of them to the petitioner, as above stated, and the arrangement made by the deed as to the children is therefore at an end; and I think that there can be no doubt that I have power, either under s. 4 of 22 & 23 Vict. c. 61, or on the ground that in fixing alimony for a wife the Court may consider what provision should be made for the maintenance of the children of whom she has the custody and control, to order the respondent to provide for the maintenance of the children; and indeed the respondent through his counsel, on the hearing before me in Court, stated that he was willing to do what was right with regard to the children, but he objected to the wife's allowance for herself being in any way reconsidered.

I have already pointed out that in the present case there is no covenant in the deed restraining the wife from claiming increased alimony, whereas in *Gandy* v. *Gandy* (4) there was such a covenant. I have also referred to the express language of s. 17 of 21 & 22 Vict. c. 85, empowering the Court to order the respondent to pay the petitioner such alimony as may be just. The parties are no longer living apart by agreement, but by the decree of the Court, and the petitioner by order of the Court has the custody of the children; so that practically all the provisions of the deed are at an end, subject to the question as to the binding effect of that relating to the wife's allowance for herself. In these circumstances, am I debarred by the first decision of the Court of Appeal in *Gandy* v. *Gandy* (4) from exercising in the circumstances of this case the powers conferred by s. 17? In my opinion I am not, and I think that, at

(1) 30 Ch. D. 57.
(2) Ante, p. 139.
(3) 6 P. D. 98.
(4) 7 P. D. 168.

any rate where there is no covenant restraining the petitioner from seeking increased alimony, I may justly award an increase of alimony, if the respondent's means allow of it, and that the mere fact that the adulterous husband may not be able to support an application to set aside his contract and reduce the amount covenanted to be paid, if his means decline, is not enough to deprive the Court of the aforesaid powers in the circumstances of the case. Therefore the order of the registrar of January 19, 1897, must be reversed, and the petitioner must have leave to file her petition for permanent alimony and maintenance of the children of the marriage, and to proceed thereon.

W. J. B.

From this decision the husband appealed.

April 7. *Cozens-Hardy, Q.C.*, and *J. C. Priestley*, for the husband. The application ought to have been refused. The learned judge relied upon the decision of the President, Sir Francis Jeune, in *Bishop* v. *Bishop* (1) (above stated), and he considered that the decision of this Court in *Gandy* v. *Gandy* (2) had been practically set aside by the subsequent decision in *Gandy* v. *Gandy*. (3) The present case is governed by the first decision in *Gandy* v. *Gandy* (2), and it is distinguishable from *Bishop* v. *Bishop*. (1) There is no jurisdiction to make such an order in a case of judicial separation. The husband has offered to give an increased allowance for the maintenance of the children. Provision is made for maintenance of children by s. 4 of the Act 22 & 23 Vict. c. 61. Nothing is said about alimony in that section. Clause 13 of the separation deed provides that it shall become void in certain events which have not happened. The deed is valid and subsisting. There is no express covenant by the wife not to sue for alimony; but a stipulation to that effect is implied, because clause 8 provides that she is to maintain herself out of the provision made for her by the deed. This is inconsistent with her being entitled to ask for an increased allowance. The principle of the deci-

(1) Ante, p. 139. (2) 7 P. D. 168.

(3) 30 Ch. D. 57.

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sion in *Gandy* v. *Gandy* (1) is that, when there is a bargain between husband and wife which is still in force, that bargain defines their rights inter se.

[RIGBY L.J. If the wife by applying for an increased allowance shews that she repudiates the separation deed, would not the Court have power to order that the husband should pay her an allowance of less amount than that provided by the deed?]

In *Gandy* v. *Gandy* (2) the Court relied upon the fact that, the marriage not having been dissolved, there was no jurisdiction to vary settlements. The stipulations contained in the deed in the present case are in substance the same as those in the deed in *Gandy* v. *Gandy*. (1) The decision in *Gandy* v. *Gandy* (3) in no way conflicts with the former decision.

[LINDLEY L.J. The first decision proceeded on the assumption that all the provisions of the deed were being observed. On the second occasion it appeared that the husband had refused to maintain the younger children.]

In *Bishop* v. *Bishop* (4) Jeune P. mistook the effect of *Gandy* v. *Gandy*. (3)

[RIGBY L.J. The circumstances are changed in the present case just as they were in *Gandy* v. *Gandy* (3), because the wife has now the custody of the children.]

The wife has bound herself to accept 150*l*. a year. The

(1) 7 P. D. 168.

(2) 7 P. D. 77, 168.

(3) 30 Ch. D. 57. The reporter has been furnished with a copy of the final order, dated August 3, 1886, made by the Probate Division in *Gandy* v. *Gandy*. It stated that on reading the statement filed on behalf of the wife and the report of the registrar, to whom the question of the means of the husband had been referred for investigation, it was ordered "that the report be confirmed and that (the husband) do, out of his present income and until further order of the Court, pay or cause to be paid to (the wife) permanent alimony at and after the rate of 750*l*. per annum, to be paid as and from August 3, 1885, credit to be given by (the wife) for the amount of the annual payment made to her by the (husband) under the trusts and provisions of (the separation deed) and for sums of 100*l*. and 137*l*. 10*s*. paid under two orders respectively dated August 5, 1885, and January 25, 1886." It was further ordered "that the arrears now due in respect of this allotment be paid by (the husband) forthwith and that the future payments be paid by equal quarterly payments."

(4) Ante, p. 139.

children can apply for maintenance under s. 4 of the Act 22 & 23 Vict. c. 61. The decision in *Gandy* v. *Gandy* (1) was based on the husband's repudiating the deed; the wife was consequently not bound by it. The order in the present case includes both alimony for the wife and maintenance for the children. The only change of circumstances is in relation to the maintenance of the children: that is not a reason why the provisions of the deed should be set aside as regards the wife herself. At any rate, some words should be inserted in the order to limit the amount of the allowance to the wife personally. Otherwise the registrar will disregard the deed altogether, and will simply inquire into the means of the husband. The husband has not yet refused to pay for the education of the children. If an increased burden is cast on the wife, it is not disputed that her allowance should be increased. But here the husband's covenant to pay the wife 150*l.* a year is not (as in *Gandy* v. *Gandy* (1)) dependent upon his paying for the maintenance of the children: that is provided for by a separate covenant. The wife's object in applying for a judicial separation must have been to obtain an increased allowance for herself.

Rawlins, Q.C., and *W. T. Barnard*, for the wife. The appeal is in fact brought against the whole of the order—as to the maintenance of the children as well as the allowance for the wife. She would be content with an order for increased alimony, she giving credit for all payments made by the husband for the maintenance of the children. The order ultimately made in *Gandy* v. *Gandy* (1) was very similar to this. Any allowance for the maintenance of the children would come to an end when the children attain twenty-one—permanent alimony would not. *Gandy* v. *Gandy* (2) is distinguishable from the present case: there the separation deed was held to be still binding, because, so far as there appeared, there was no change of circumstances. In the present case, too, there is not (as there was there) a covenant by the wife not to sue for increased alimony. And there has been here as material a

(1) 30 Ch. D. 57. (2) 7 P. D. 168.

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change of circumstances as there had been when *Gandy* v. *Gandy* (1) was decided. The husband treats his covenant to pay for the education of the children as no longer binding, because they are now at a different school. He has not come to any agreement with the wife under clause 9 of the deed as to the payment to be made by him now that the children are above fifteen.

A covenant by the wife not to sue for increased alimony was no doubt designedly omitted from the deed; clause 8 does not amount to a negative covenant to that effect. The fact that the Court could not order that alimony less than the sum agreed upon should be paid to the wife is not a reason why it should refuse to order the husband to pay a larger alimony, if it would be just that he should do so. The wife is not repudiating the deed. The payment of 150*l.* to her was part of a scheme; she was content with that so long as the other provisions of the deed were observed, but now the circumstances are entirely changed.

Priestley, in reply.

Cur. adv. vult.

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April 14. LINDLEY L.J. read the following judgment of the Court (Lindley, A. L. Smith and Rigby L.JJ.):—These are two appeals from two orders of the Divorce Court, and in both of them the appellants rely on the decision of this Court in *Gandy* v. *Gandy* (2), which is said to be inconsistent with the orders appealed from. It will be convenient, therefore, in the first place, to examine the case referred to and to ascertain exactly what was there decided. *Gandy* v. *Gandy* (2) came twice before the Court of Appeal—first, on one state of facts; and, secondly, on another and quite different state of facts. The first decision of *Gandy* v. *Gandy* (3) appears to have been greatly misunderstood. Lord Hannen had held that a deed of separation between husband and wife

(1) 30 Ch. D. 57. (2) 7 P. D. 168; 30 Ch. D. 57. (3) 7 P. D. 168.

ought to be treated as based on the implied condition that both parties should live apart in chastity; and he held that the subsequent adultery of the husband enabled the wife not only to sue for and obtain a decree for judicial separation, but also to sue for and, if the husband's means permitted, to obtain a larger allowance by way of alimony than she had agreed to accept when she separated from him. The wife had expressly covenanted not to sue for more than the agreed allowance; but this covenant was held by Lord Hannen not to be binding on her, the implied condition of chastity having been broken by the husband. (1) On appeal this decision was reversed (2), and the condition held by Lord Hannen to be implied in all deeds of separation was decided by this Court not to be implied, and, no other ground for relieving the wife from her covenant being suggested except that the husband's means had improved, this Court held the wife to be bound by her covenant, and her petition for increased alimony was dismissed. This was all that the Court of Appeal then decided, and the Court has never gone back from that decision. When the case came before the Court of Appeal on the second occasion (3) other circumstances were brought to the attention of the Court, namely, that the Divorce Court had given the custody of the two youngest daughters to the wife, and that the husband refused to support them, which he had covenanted to do by the separation deed. Under these circumstances this Court held that the wife was no longer bound by her covenant not to sue for further alimony, and that it was competent for the Divorce Court to grant her more than she had agreed to accept in the deed of separation. This Court accordingly made an order giving her leave to present a fresh petition to the Divorce Court for increased alimony. (4) This she did, and she ultimately obtained a considerable allowance beyond what her husband had covenanted to pay her by the deed of separation. This decision was perfectly consistent with the first decision, which was based on a different state of facts. The decision in *Gandy* v. *Gandy* (2) that continued chastity is

(1) 7 P. D. 77.
(2) 7 P. D. 168.
(3) 30 Ch. D. 57.
(4) 30 Ch. D. 57, at p. 83.

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not a condition underlying separation deeds, and to be implied in them accordingly, is obviously a decision of general application, and has no reference to the nature of the proceeding in which such a question arises. But, in considering the power of the Divorce Court to disregard agreements between husband and wife, it is very important to consider whether that Court has decreed a judicial separation or a dissolution of marriage. The Court of Appeal in the first case of *Gandy* v. *Gandy* (1) drew attention to this, and laid great stress upon it, and expressed no opinion on what the Divorce Court could or could not do in cases of dissolution of marriage. But the Court of Appeal on the first occasion, whilst negativing the implied condition of chastity, distinctly recognised that there might be circumstances which would entitle the Divorce Court, even in suits for judicial separation, to disregard bargains between husband and wife. Such bargains cannot prevent the Court from doing what is right as regards infant children, and on the second occasion the Court of Appeal acted on this view, as already pointed out. The short result of *Gandy* v. *Gandy* (1) may be summed up thus: (1.) Lord Hannen's decision that continued chastity was an implied condition in separation deeds was overruled; (2.) in the first case of *Gandy* v. *Gandy* (1) the Court held the wife bound by her agreement, there being no circumstances to relieve her from it, and no power in the Divorce Court to disregard her covenant; (3.) in the second case of *Gandy* v. *Gandy* (2), the wife having the custody of the children and the husband refusing to support them, she was held no longer bound by the covenants in the separation deed; and the Divorce Court, being free to disregard it, had power to do what it thought just in making her an allowance in the shape of alimony, and to take into account whatever circumstances it considered material in arriving at a conclusion as to what was just under the altered position of the parties; (4.) nothing was decided respecting any of the statutory powers of the Divorce Court in suits for dissolution of marriage; (5.) nothing was decided in the first suit of *Gandy* v. *Gandy* (1)

(1) 7 P. D. 168. (2) 30 Ch. D. 57.

as to the power of the Divorce Court to make orders respecting the custody, maintenance, and education of children. We pass now to the appeals before us. First, as to *Bishop* v. *Bishop*. [The Lord Justice then stated the facts in that case, and continued:—]

The agreement contained no covenant by either party not to sue the other at some future time for restitution of conjugal rights, or for a judicial separation, or for a divorce, and, indeed, the possibility of proceedings in future for a divorce was evidently contemplated, for the parties agreed that the allowance should be paid whether they remained married or whether the marriage should thereafter be dissolved. Further than this, the agreement contained no covenant by the wife not to sue for more than the 130*l*. Counsel for the wife contend that the 130*l*. a year was the minimum she would accept, but not the maximum she would endeavour to obtain if circumstances should occur enabling her to do so. It is to be observed that the agreement provided that the wife should have the child and maintain her out of the agreed allowance. The decree giving the wife the custody of the child has therefore not imposed any additional burden on the wife in this respect. It is further to be observed that the agreement provided for a possible dissolution of the marriage, and it cannot therefore be said that the circumstances which have arisen were not foreseen and provided for by the parties. On the other hand, the agreement did not provide for the education of the child, but only for her custody and maintenance. Nor can the agreement in any way preclude any application on behalf of the child for a proper allowance for her maintenance and education, if any such can be made under the Divorce Acts. The case being one of dissolution of marriage, and not of judicial separation, *Gandy* v. *Gandy* (1) is not in point, except in so far as it negatives any implied condition of continued chastity. The present case must turn on the power of the Divorce Court on a dissolution of marriage to compel a husband to provide for his divorced wife, and to make orders for the maintenance and education of the children. It is

(1) 7 P. D. 168.

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necessary, therefore, to examine the provisions of the Divorce Acts relating to these matters. The statutory powers of the Court as to a divorced wife's maintenance are 20 & 21 Vict. (1857) c. 85, s. 32, and 29 & 30 Vict. c. 32, s. 1. The statutory powers of the Court as to children are contained in 20 & 21 Vict. c. 85, s. 35, and 22 & 23 Vict. c. 61, s. 4. As regards permanent maintenance, s. 32 of the Act of 1857 is very wide indeed, and it would not be right for this or any Court to put a narrow construction upon it, or to fetter in any way the Court or judge intrusted with its application in cases of divorce. The section says that regard is to be had to the wife's fortune, to the ability of the husband, and to the conduct of the parties. The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right. The later Act, 29 & 30 Vict. c. 32, s. 1, which extends the power of the Court and enables it to order monthly or weekly payments, must be read with the former section, and the same circumstances which the Court is told to regard when ordering a gross or annual sum to be secured must be regarded when a monthly or weekly sum is ordered to be paid. The agreement no doubt contemplates the continuance of the agreed allowance, even in the event of a future dissolution of marriage. The validity of the agreement in this respect is very questionable. Wood V.-C. said in *H.* v. *W.* (1): "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate." This was before the Divorce Act had been passed, and before Lord Westbury's celebrated decision in *Hunt* v. *Hunt*. (2) But we are not aware of any authority since the Divorce Act which shews that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, and we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognised. There is no express covenant to that effect in the present case; and a covenant of such very questionable validity certainly cannot be implied. In other words, the wife cannot

(1) (1857) 3 K. & J. 382, at p. 387. (2) (1861) 4 D. F. & J. 221.

be held to have precluded herself by her agreement from invoking the aid of the Court to obtain further maintenance in the events which have happened. The foregoing statutory powers amply justify the order under appeal. But the statutory powers relating to the custody, maintenance, and education of children are also very wide, and no agreement between the parents can deprive the Court of the jurisdiction thus conferred upon it. These powers are exercisable not only in suits for dissolution of marriage, but also in suits for judicial separation. They amply warranted what was done in *Gandy* v. *Gandy* (1) on the second occasion. On the first occasion nothing turned upon them, and they were not alluded to. The power of the Divorce Court to vary settlements does not assist the wife on the present occasion. Sect. 45 of 20 & 21 Vict. c. 85, only enables the Court to deal with property settled on the wife. Sect. 5 of 22 & 23 Vict. c. 61, extends this power to property settled on either husband or wife. The other statutes do not extend the power to other property. Even if the agreement for separation in this case is a post-nuptial settlement, no variation of that agreement dealing with the property settled by it can be made which will in any way benefit the wife, and there is no other settled property that we are aware of which can be made available for her benefit. But, on the ground that the other statutory powers to which we have referred are ample to justify the order appealed from, and there being no grounds for discharging that order, if there is jurisdiction to make it, this appeal must be dismissed with costs.

We now pass to *Judkins* v. *Judkins*. [The Lord Justice stated the facts, and continued:—]

It will be observed that this is a case of judicial separation, and not of divorce, and that, whilst the separation deed left the custody of the children with the husband, the decree of the Divorce Court has given that custody to the wife. Further, the husband's covenant to pay the school bills of the girls only extends to the bills at the school at which they were at the date of the deed, and one of the girls being over fifteen no sum

(1) 30 Ch. D. 57.

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for her clothing is payable under the separation deed, the husband and wife not having agreed upon any allowance. The husband in this case has by his counsel expressed his willingness to do whatever the Court may think right as regards the girls, but this offer does not affect the jurisdiction of the Court nor the right of the wife to invoke its aid. The separation deed contains no express covenant not to sue for a greater allowance than 150*l.* a year, and is in this respect less explicit than the deed in *Gandy* v. *Gandy*. (1) The covenant not to molest is shewn by the next clause not to apply to proceedings in the Divorce Court based on subsequent misconduct, even if it could so apply apart from such context; and the covenant by the wife to pay her own debts and indemnify her husband against them does not prevent her from applying for maintenance for the children. Under these circumstances Gorell Barnes J. was right in holding the second decision in *Gandy* v. *Gandy* (1), rather than the first decision, applicable to the present case. No doubt there are observations in the judgments on the first occasion which favour the contention of the husband, but, as already pointed out, nothing then turned on the custody or maintenance of the children. It was contended by counsel for the husband that, even if an order were made for the maintenance of the children, it ought to be confined to that, and ought not to extend to alimony for the wife. But it is obvious that in considering what ought to be done as to either allowance the Court must consider the other. Gorell Barnes J. made the order in the exercise of the jurisdiction conferred upon the Court by 20 & 21 Vict. c. 85, s. 17 (alimony) and s. 35, amended by 22 & 23 Vict. c. 61, s. 4 (maintenance). We see no reason to alter the form of the order, especially having regard to the form adopted in *Gandy* v. *Gandy* (1) and the observations of Cotton L.J. (2), and the orders ultimately made by the Divorce Court for alimony after the second decision of this Court in that case. The whole case as to alimony and maintenance is properly open as soon as the position of the parties provided for by the deed is altered by the order of the

(1) 30 Ch. D. 57. | (2) 30 Ch. D. at pp. 79, 80.

Court changing the custody of the children. The appeal in this case must also be dismissed with costs.

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Appeals dismissed.

Solicitors in *Bishop* v. *Bishop* :—
For appellant: *Edward J. H. Carter.*
For respondent: *Edwin Smith & Ellis.*

G. I. F. C.

Solicitors in *Judkins* v. *Judkins* :—
For appellant: *Arnold Williams & Co.*
For respondent: *H. B. Wade.*

W. L. C.

SYMONS *v.* SYMONS.

(THE QUEEN'S PROCTOR INTERVENING.)

1897
March 30;
April 8.

Divorce — Misconduct of Petitioner — Adultery — Wife's Petition — Wilful Neglect or Misconduct of Husband conducing to Wife's Adultery—Discretion of Court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

The circumstances to be considered by the Court in exercising its discretion under s. 31 of the Divorce and Matrimonial Causes Act, 1857, to grant a divorce to a wife who has been guilty of adultery include the case of the husband causing or conducing to her adultery by his own wilful neglect or misconduct.

A husband, who had treated his wife with great cruelty during cohabitation, finally deserted her and went to live with another woman. More than seven years after the desertion the wife, not knowing whether her husband was alive, and without making inquiry, commenced to live with another man; the cohabitation continued long after the time when it came to the wife's knowledge that her husband was alive. Subsequently, and after the wife had ceased to live in adultery, her husband was convicted under the Criminal Law Amendment Act, 1885, of an aggravated offence on a young girl not amounting to rape:—

Held, that under the circumstances the wife's adultery did not disentitle her to a decree of dissolution of marriage.

THE following statement of facts is taken from the written judgment of the President.

The wife, who was the petitioner, obtained a decree nisi on

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June 29, 1896, on the ground of the husband's adultery and desertion. The Queen's Proctor has intervened, alleging the commission of adultery by the wife, and partly by admissions of her solicitors, partly from the evidence given at the hearing of the case, and also from statements of the learned counsel before me, the material facts are sufficiently clear. They are as follows :—

The marriage took place on July 3, 1863. During the next five years the husband was guilty of repeated acts of adultery and of gross cruelty. He left his wife in 1868, and finally deserted her in 1870. The wife heard nothing of him till 1879, when she learned that he was at Burton-on-Trent; but I am not satisfied that she could not have ascertained that he was alive had she made any effort to do so. In 1887, when she was out of work and in want, she made the acquaintance of a Mr. Clark, and soon after she went to live with him, and so lived until 1892. Undoubtedly therefore she continued to live with him after she knew for certain that her husband was alive, though she did not know whether or no her husband was alive when she first lived with him. On July 31, 1895, the respondent was convicted under the Criminal Law Amendment Act and sentenced to fifteen months' imprisonment for an offence on a young girl of a revolting kind, but not amounting to rape. The question is whether under the circumstances I should, in the exercise of my discretion under s. 31 of the Act of 1857, refuse to make the decree absolute.

Priestley (*F. H. Mowatt* with him), for the Queen's Proctor. The discretion of the Court to pronounce a decree for dissolution of the marriage where the petitioner has been guilty of adultery is a judicial discretion, and can only be exercised on certain well-recognised grounds. In *Morgan* v. *Morgan* (1) Lord Penzance, after stating the three classes of cases in which up to that time the discretion had been exercised in favour of the petitioner, distinctly lays it down that where the petitioner's adultery has no special circumstances attending it, and no special features placing it in some category capable of distinct

(1) (1869) L. R. 1 P. & M. 644.

statement and recognition, there would be great mischief in granting or withholding a divorce merely upon the ground of the adultery being more or less pardonable or capable of excuse; and the same doctrine was laid down and applied by the same learned judge in *Noble* v. *Noble*. (1) This is substantially the test that has been applied when the Court has been asked to exercise its discretion under the section, and there are in the present case no special circumstances or special features attending the petitioner's adultery to justify a decree in her favour. Assuming that she did not know her husband was alive when she first lived in adultery, she continued to so live for several years after she had discovered that he was living. The onus is upon the petitioner to shew that the discretion of the Court should be exercised in her favour, and she has not discharged it. [He also cited *McCord* v. *McCord* (2); *Otway* v. *Otway* (3); *Stoker* v. *Stoker* (4); *Story* v. *Story* (5); *Anichini* v. *Anichini* (6); *Joseph* v. *Joseph* (7); *Coleman* v. *Coleman*. (8)]

Newson (*W. R. Warren* with him), for the petitioner. Admitting that the discretion of the Court under s. 31 is a judicial discretion, it should be exercised in favour of the petitioner; the circumstances of the case bring it within the principles laid down in previous decisions. The case is very similar to *Collins* v. *Collins* (9), where the gross character of the husband's misconduct was one of the grounds upon which the discretion was exercised in the wife's favour. The present is, indeed, a stronger case, for in *Collins* v. *Collins* (9) the wife knew that her husband was living when she committed adultery, and there was no desertion of the wife by the husband. *McCord* v. *McCord* (2) is distinguishable, for in that case the petitioner was the husband, and there were no special circumstances or special features whatever in the adultery of which he had been guilty. In *Otway* v. *Otway* (3) Cotton L.J. seems to have been of opinion that relief should only be granted to an innocent

(1) (1869) L. R. 1 P. & M. 691.
(2) (1875) L. R. 3 P. & M. 237.
(3) (1888) 13 P. D. 141.
(4) (1889) 14 P. D. 60.
(5) (1887) 12 P. D. 196.
(6) (1839) 2 Curt. 210.
(7) (1865) 34 L. J. (P. & M.) 96.
(8) (1866) L. R. 1 P. & M. 81.
(9) (1884) 9 P. D. 231.

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petitioner coming into court with clean hands—a principle which, if acted upon, would take away the statutory discretion altogether. [He also cited *Conradi* v. *Conradi* (1); *Barnes* v. *Barnes* (2); *Freegard* v. *Freegard* (3); *Rose* v. *Rose*. (4)]

Priestley, in reply, cited *Grosvenor* v. *Grosvenor*. (5)

Cur. adv. vult.

April 8. The following written judgment was delivered by

SIR F. H. JEUNE, PRESIDENT. [After stating the facts as above, the learned judge proceeded:—] The principles upon which the Court acts in exercising the discretion conferred upon it by s. 31 of the Matrimonial Causes Act, 1857, are unquestionable. In *Morgan* v. *Morgan* (6) Lord Penzance said: "In cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse." These words were repeated with approval by Sir James Hannen in *McCord* v. *McCord* (7) and Butt J. in *Grosvenor* v. *Grosvenor*. (5) I think that this opinion, which must be accepted as authoritative, may be expressed to the same effect, but in a form more easy of application, by saying that each case must be decided according as certain definite and recognised circumstances, alone or in combination with each other, are or are not shewn to exist. It is with reference to such considerations that the Court has in fact, in various instances, under the Act of 1857, exercised its discretion in granting relief. There is, for example, the case of *Anichini* v. *Anichini* (8), an authority of great importance, because, as

(1) (1868) L. R. 1 P. & M. 514.
(2) (1868) L. R. 1 P. & M. 572.
(3) (1883) 8 P. D. 186.
(4) (1883) 8 P. D. 98.
(5) (1885) 34 W. R. 140.
(6) L. R. 1 P. & M. 644.
(7) L. R. 3 P. & M. 237.
(8) 2 Curt. 210.

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Lord Westbury had unequalled means of knowing and pointed out in *Lautour* v. *H. M. Proctor* (1), it expressed principles in the light of which s. 31 of the Act of 1857 was framed, and, also, because it has been accepted—see *Goode* v. *Goode and Hamson* (2) and *Morgan* v. *Morgan* (3)—as a guide in the exercise of discretion under that section. In that case four considerations—namely, that the act of adultery by the husband was with one person only, that it occurred several years anterior to the adultery charged against the wife, that it was condoned by the wife, and that the wife's adultery was of a gross character—were held, taken together, to justify the Court in exercising its discretion in the petitioner's favour. Again, in *Goode* v. *Goode and Hamson* (2), the fact of condonation was taken into consideration with the improper relations of the parties before marriage, the duration of the misconduct of the petitioner and his violence to his wife, and in the result the petition was dismissed. Again, in *Story* v. *Story* (4), condonation taken into consideration with the probable influence of the husband's misconduct on the wife's, and in *Stoker* v. *Stoker* (5), condonation taken into consideration with the incestuous character of the petitioner's adultery led to a refusal of the decree; whereas in *Collins* v. *Collins* (6) condonation considered together with the nature of the respondent's misconduct, and also the fact that he was undergoing a sentence of penal servitude, induced the Court to make the decree for dissolution. Other cases might be analyzed to the same effect, but I think that those to which I have referred are sufficient to shew that the Court takes, I do not say all, but certain definite circumstances into consideration, and, according to their weight separately and in combination, exercises its judicial discretion. It is only necessary to add that the circumstances which may be taken into consideration, though they must be specific in character, have never yet been held to be contained in an exhaustive list, incapable of admitting additions. In *Morgan* v. *Morgan* (3) the learned judge not only indicated his opinion

(1) (1864) 10 H. L. C. 685, 697.
(2) (1861) 2 Sw. & Tr. 253.
(3) L. R. 1 P. & M. 644.
(4) 12 P. D. 196.
(5) 14 P. D. 60.
(6) 9 P. D. 231.

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that the views expressed in *Anichini* v. *Anichini* (1) might on proper occasion be considered in applying the discretion under the Act of 1857, but he recognised that beyond the three classes of cases specified by him, in one of which *Anichini* v. *Anichini* (1) constituted the leading instance, there were probably others in which the discretion might be fitly exercised in favour of a petitioner; and in fact new considerations have from time to time been relied on as grounds for granting or refusing a decree.

In the present case more than one matter in my judgment deserves attention. First, the petitioner at the time she committed her offence had for about nine years been ignorant of her husband's existence. If it could be held in this instance, as it was in *Freegard* v. *Freegard* (2), that the petitioner had good reasons for believing, and believed, that the respondent was dead, that would alone justify the exercise of the discretion in the petitioner's favour. But in this case it cannot be maintained that the petitioner believed on reasonable grounds that her husband was dead. The most that can be said is that she did not know of his being alive. She never endeavoured to ascertain if he was dead or alive. It is not clear what she told her paramour, but she certainly did not tell him that her husband was dead, and she continued to live with him after she knew that her husband was alive. Although, therefore, I think that this consideration tells in the wife's favour, on the same principle that the Legislature has allowed similar ignorance to constitute a defence to a charge of bigamy, I am not prepared to hold, though it is not in the present case necessary to decide, that standing alone it would entitle her to a decree.

Secondly, the misconduct of the petitioner certainly did not conduce to the misconduct of the respondent. This, however, is a consideration of negative rather than positive weight. It was allowed in *Story* v. *Story* (3), as I have mentioned, to deprive the petitioner of the advantage of the fact of condonation; but it has never, so far as I am aware, been held a ground on which discretion could be favourably exercised; and indeed

(1) 2 Curt. 210.

(2) 8 P. D. 186.

(3) 12 P. D. 196.

so to hold would exclude the cases in which adultery is committed by a petitioner between decree nisi and decree absolute : see *Hulse* v. *Hulse and Tavernor*. (1) In saying this I do not forget the decision of the House of Lords in *Major Campbell's Case* (2), where the House of Lords decided, as the Delegates had previously held, that adultery by the petitioner, the husband, after the adultery charged against the wife, could not be pleaded by her. It might be supposed that this rested on the ground that the husband's adultery could not have conduced to the wife's. But this probably was not so. The case was considered in *Lautour* v. *H. M. Proctor* (3) in the House of Lords, and Lord Westbury suggested that the refusal to admit the plea was based on the fact that the adultery of the wife was of an incestuous character ; and it is difficult, unless this was the ground, to suppose that Sir William Scott would, without reference to this case, have laid down the practice of the Ecclesiastical Courts as unhesitatingly as he did in *Proctor* v. *Proctor*. (4) It may be remarked that in the last-mentioned case, as in the present, the petitioner's adultery was subsequent to the discovery of that of the respondent ; but though obviously regretting the decision at which he was compelled to arrive, the learned judge felt compelled by the rule of canon law to refuse the divorce â mensâ et thoro.

Thirdly, the petitioner relies on the heinous character of the husband's misconduct. In the case of *Collins* v. *Collins* (5) it was held that, where the respondent committed a rape, the adultery of the petitioner which was condoned did not disentitle her to a divorce. I think that the reason why in former times at any rate the character of some kinds of sexual misconduct on the part of the respondent would have been held to justify an exercise of discretion, and the allowance of a divorce, in favour of a guilty petitioner, was that it rendered the resumption of cohabitation, which the law regarded as the necessary consequence of refusal of a decree, impossible. In *Anichini* v. *Anichini* (6) Dr. Lushington said : " I know no authority which

(1) (1871) L. R. 2 P. & M. 259.
(2) (1799) Macq. H. L. Pr. 590.
(3) 10 H. L. C. 685.
(4) (1819) 2 Hagg. Cons. 292.
(5) 9 P. D. 231.
(6) 2 Curt. 210.

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states that whatever be the guilt of both parties, if the Court does not pronounce for a separation, they are not according to the law of this country bound to live together." It was for this reason, namely, the impossibility of cohabitation, as appears from Lord Thurlow's, Lord Eldon's, and Lord Rosslyn's speeches in *Mrs. Addison's Case* (1), that the commission of incest by a husband gave a wife the right to a dissolution of marriage. It is not necessary to inquire how far since the Matrimonial Causes Act, 1884, the same considerations apply, or whether their place is not to some extent taken by considerations connected with the pecuniary position of a wife living separate, but not judicially separated or divorced, because I do not think it possible to go beyond those kinds of sexual misconduct for which the law allows a dissolution of marriage on the prayer of the wife without opening the door to that vagueness and uncertainty in the exercise of the discretion which has been deprecated by the authorities to whom I have above referred.

Fourthly, I now come to what I regard as the circumstance of most weight in this case. I have no doubt that the husband's adultery and cruelty before his desertion, and his prolonged desertion, were the main causes of the wife's adultery, and he was guilty, therefore, of misconduct conducing to her adultery. So far as I know, this has not yet been decided to be one of the circumstances on which the discretion to allow a divorce may be exercised. It was decided in *Coleman* v. *Coleman* (2) that, where a husband by threats and terrorism compelled his wife to lead a life of prostitution, her adultery did not prevent her from obtaining a divorce. The present case obviously falls far short of this; and indeed it can hardly be said that a wife under such compulsion is guilty of the offence which is forced on her. In *Pearman* v. *Pearman and Burgess* (3), where the husband proved adultery on the part of the wife, and the wife proved cruelty on the part of the husband, the full Court, finding that the wife's drunken habits were the cause of the husband's cruelty, exercised the discretion by granting a dis-

(1) (1801) Macq. H. L. Pr. 594; see Campbell's Life of Lord Thurlow.

(2) L. R. 1 P. & M. 81.

(3) (1860) 1 Sw. & Tr. 601.

solution of marriage—a decision which appears to me to recognise that in exercising its discretion the Court will not allow a respondent to rely on misconduct by a petitioner of which he or she has been the cause.

After very careful consideration, I have come to the conclusion that it is safe and proper to hold that the circumstances which may be considered in exercising this discretion should include the case of a husband causing or conducing to his wife's adultery by his own wilful neglect or misconduct. I am much influenced by observing the course which the House of Lords pursued in dealing with petitions for divorce before the Act of 1857, and the language of that and a subsequent Act. Before the Act of 1857 there was a remarkable difference between the view taken by the Ecclesiastical Courts and that acted on by the House of Lords with regard to the effect of a husband's conduct having been the cause of the adultery which he complained of in his wife. It is not too much to say that, unless corrupt connivance were proved, the Ecclesiastical Court considered that no conduct of the husband conducing to his wife's adultery barred his right to relief. In the case of *Phillips* v. *Phillips* (1) Dr. Lushington said of the petitioner: "Of most culpable negligence I cannot acquit him, of the most supine inertness when his honour loudly called for the most active interposition, I must say he is guilty," but the petitioner was held entitled to his decree. Sir William Scott had gone even further. In the case of *Moorsom* v. *Moorsom* (2), though the learned judge held that "if the question were whether Moorsom acted as a prudent, a wise or an attentive man, the result would be unfavourable, if it were a question whether in fact he contributed to the disgrace of his family the answer would again be unfavourable," and added that "in pronouncing for a separation I feel that I shall tolerate a negligent inattention to marital duty, and that I shall pronounce a decree which will not lead to the peace and honour of families, nor to the purity of private life," yet he felt constrained to grant the separation. The course taken by the House of Lords was very different. The conduct of the husband petitioning was always inquired

(1) (1844) 1 Rob. 144.

(2) (1793) 3 Hagg. 87.

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into with care. In several instances neglect, or a want of due care and caution, prevented the petitioner obtaining the relief which he sought: *Taafe's Case* (1); *Perry's Case* (2); *Crewe's Case* (3); and see *Dundas' Case.* (4) Indeed, the mere fact of a voluntary separation was held to call for explanation, and bills were repeatedly rejected when no adequate reason for the separation was shewn: *Esten's Case* (5); *Barttelot's Case* (6); *Woodcock's Case* (7); *Barker's Case.* (8) I cannot doubt that in inserting the concluding words in s. 31 of the Act of 1857 the Legislature proposed that in cases of dissolution the practice of the House of Lords should prevail over the practice of the Ecclesiastical Courts, and that it was intended emphatically to assert that a husband ceased to be entitled to complain of his wife's infidelity, if his own misconduct or neglect had conduced to it. This does not, however, of course shew, though I think it goes far to shew, that a husband should not be allowed to plead his wife's misconduct against charges made by her, if he was the real cause of that misconduct. But the Legislature has recently indicated its view more clearly on this point. In the Summary Jurisdiction (Married Women) Act, 1895, it is enacted (s. 6) that a married woman forfeits her right to an order under that Act if she be proved guilty of adultery; but this is subject to a proviso that the husband has not by his wilful neglect or misconduct conduced to that act of adultery. I read this proviso as declaratory of the law, or at least as indicating a belief in the framers of this Act that the law of this Court is what I am now holding it to be, because I cannot suppose that it was intended that a married woman should be placed in a totally different position in regard to a separation under that Act from her position in regard to a separation or divorce in the High Court, and I think that I should, without reason or necessity, make an important difference between the law as administered here and in the court of summary jurisdiction were I to refuse to treat a husband's wilful neglect or

(1) (1819) Macq. H. L. Pr. 624.
(2) (1838) Macq. H. L. Pr. 663.
(3) (1801) Macq. H. L. Pr. 599.
(4) (1814) Macq. H. L. Pr. 609.
(5) (1798) Macq. H. L. Pr. 588.
(6) (1799) Macq. H. L. Pr. 589.
(7) (1802) Macq. H. L. Pr. 600.
(8) (1825) Macq. H. L. Pr. 634.

misconduct conducing to his wife's adultery as a ground for exercising discretion in her favour.

On principle, there appear to me to be strong reasons for holding that such wilful neglect or misconduct by a husband should constitute matters, possibly not always conclusive, but fit to be taken into consideration in exercising the discretion whether a divorce shall be granted against him. To hold otherwise would be to allow him to profit by his own wrong; nay more, it would make the law represent to him that he may escape the penalty of his own misdoing, if only he adds one dishonour to another, and degrades his wife to his own level by any neglect short of connivance, or any misconduct short of compulsion. For these reasons I think that in the exercise of my discretion I ought to make absolute the decree nisi in this case. I need hardly say that the Queen's Proctor was fully justified in bringing the case before the Court, and there will be no order as to costs.

Solicitors for petitioner: *Mann & Crimp.*

Solicitor for Queen's Proctor: *Solicitor to the Treasury.*

W. J. B.

1897
March 22;
April 6.

THE CRATHIE.

Admiralty—Collision—Damages—Sale of Ship in Foreign Court—Limitation of Liability—Distribution of Proceeds—Right of Claimants in Foreign Court to Participate—Interest on Life Claims—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

After a collision between a British and a German steamship, in the North Sea, the German vessel sank with her cargo, and a large number of her crew and passengers were drowned. The British vessel put into Rotterdam, and was there proceeded against by the owners of the German vessel and by two claimants interested in cargo. The British vessel having been found alone to blame, she was sold by order of the Court, and the net proceeds paid out rateably to the three claimants.

The owners of the British vessel, as plaintiffs, having obtained a decree in a limitation action in this country, under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, paid into court an amount equal to 8*l.* per ton of their statutory liability with interest to date, and in respect of the life claims gave bail to pay the balance of 7*l.* per ton when required. On the question as to the right of those who had sued in Holland to participate in the distribution of this sum, and as to the allowance of interest on the 7*l.* per ton:—

Held, by Gorell Barnes J., that the owners of the German vessel, and the claimant in respect of cargo (the other claimant not taking part in the proceedings), were not debarred from proving against the fund in court to the full extent of their loss, but, in ascertaining the proportion receivable by them, credit must be given for the sums they had respectively been paid out of the proceeds of the sale of the ship, and the plaintiffs were entitled to take out of the fund a sum equal to the amounts received by the three claimants abroad. Also that, as part of the damages, 4 per cent. interest was payable on the sum representing 7*l.* per ton from the date of the collision until payment into court.

Motion by plaintiffs, the owners of the steamship *Crathie*, in an action for limitation of liability, for confirmation of the report of the registrar, subject to the questions reserved for the consideration of the Court, namely, whether claimants who had taken proceedings against the *Crathie* in a foreign country, and, after obtaining a decree for the sale of the ship, had been paid a portion of their claims out of the proceeds, were entitled to participate in the distribution of the fund paid into court under the decree in the limitation action in this country; and,

secondly, whether interest was payable on the amount for which bail was given to answer the life claims.

Sir Walter Phillimore, and *Kilburn*, for the plaintiffs, the owners of the *Crathie*.

Joseph Walton, Q.C., and *Stubbs*, for defendant owners of cargo lately laden on board the *Elbe*.

W. Baden Powell, for other defendant cargo owners.

A. Pritchard, for the majority of the defendant life claimants.

Aspinall, Q.C., and *Butler Aspinall*, for the owners of the *Elbe* and some life claimants.

The facts and arguments fully appear from the judgment.

[In addition to the cases mentioned in the judgment, the following were referred to: *The Dundee* (1); *The Hope* (2); *The Kalamazoo* (3); *The Amalia* (4); *The Gertrude*; *The Baron Aberdare* (5); *The Vera Cruz* (6); *The Orwell* (7); *The John and Mary* (8); *The Orient.* (9)]

Cur. adv. vult.

April 6. GORELL BARNES J. The facts of this case are as follows: On January 30, 1895, a disastrous collision occurred in the North Sea between the British steamship *Crathie* and the German steamship *Elbe*, belonging to some of the defendants, which was bound from Bremen to New York with cargo and passengers. In consequence of the collision the *Elbe* sank, and was totally lost with her cargo and the crew's and passengers' effects, and a large number of her crew and passengers were drowned.

The *Crathie* after the collision put into Rotterdam damaged by the collision, and proceedings were taken against her in the court there by the owners of the *Elbe*, and the Atlantic Mutual Insurance Company of New York, and the British and Foreign

(1) (1827) 2 Hagg. Adm. 137.
(2) (1840) 1 Wm. Rob. 154.
(3) (1851) 15 Jur. 885.
(4) (1863) Br. & L. 151.
(5) (1888) 13 P. D. 105.
(6) (1884) 10 App. Cas. 59.
(7) (1888) 13 P. D. 80.
(8) (1859) Swa. 471.
(9) (1871) L. R. 3 P. C. 696.

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Marine Insurance Company, who were interested in portions of the cargo of the *Elbe*. In these proceedings the *Crathie* was found to blame for the collision, and sold by order of the Court, and the net proceeds, 1005*l*. 2*s*. 6*d*., were paid out to the three claimants rateably. The owners of the *Elbe* received 682*l*. 8*s*. 8*d*., the Atlantic Mutual Insurance Company of New York 204*l*. 3*s*., and the British and Foreign Marine Insurance Company 118*l*. 10*s*. 10*d*.

The owners of the *Crathie*, some of whom reside in England and some in Scotland, instituted the present suit to limit their liability for the collision, which occurred without their fault or privity, and on June 15, 1896, a decree was pronounced fixing their statutory liability at 6877*l*., being 15*l*. per ton on the tonnage of the *Crathie*, exclusive of interest; but all questions with respect to the liability of the plaintiffs for any damages for loss of life or personal injury and with respect to the appropriation of the proceeds of the sale of the vessel under the order of the Court at Rotterdam were reserved. On July 4, a sum of 3879*l*. 8*s*. was paid into court, being at the rate of 8*l*. per ton, inclusive of interest thereon at 4 per cent. per annum from the date of the collision to the date of payment into Court, and bail was given to pay when required the balance of 7*l*. per ton, amounting to 3209*l*. The claims in the suit were referred to the registrar and merchants for assessment, and the registrar made his report on February 12, 1897, from which it appears that the total claims for loss of life have been assessed at 15,870*l*., and for loss of property at 130,690*l*. This last sum includes a claim by the owners of the *Elbe* for the loss of that vessel amounting to 47,125*l*., and a claim by the British and Foreign Marine Insurance Company in respect of the goods for which they had claimed at Rotterdam amounting to 7556*l*., but the Atlantic Mutual Insurance Company of New York made no claim in the present proceedings.

Objections were taken to the report of the registrar, which were heard by me on March 22 on motion, when the several parties were represented. The owners of cargo other than the Atlantic Insurance Company and the British and Foreign Insurance Company objected that no claim could be made in these

proceedings by the owners of the *Elbe* and these two companies because they had elected to sue in Holland. The claims of these claimants, however, were not satisfied in full in the proceedings in Holland, and there is no ground for excluding them from coming in as claimants in this suit. The objection was not supported by the citation of any authority or by any valid argument.

A discussion then took place as to the proper method of adjusting the claims against the sum of 3879*l.* 8*s.* in court, having regard to the payments made to the three claimants in Holland. I am of opinion that the amount to be paid to each claimant against this fund must be calculated in the first instance as if no payments had been made in Holland, and as if the Atlantic Insurance Company had claimed in this suit, but that the owners of the *Elbe*, and the British and Foreign Insurance Company, must respectively give credit as against the sums which such a calculation will shew to be payable in respect of their claims for the sums which they have respectively received in Holland. The amount will then work out thus—if the credits to be allowed by the two last-mentioned claimants respectively are equal to or less than their respective proportions of the fund, these two claimants respectively will have the differences, if any, to receive, and the plaintiffs will take out of the fund a sum equal to the amounts already received by these two claimants, and it follows that the plaintiffs will also take out of the fund a sum equal to the amount received by the Atlantic Insurance Company. If, on the other hand, the credits respectively exceed their respective proportions of the fund, these two claimants will take nothing out of the fund, and the owners of the *Crathie* will only take out of the fund the proportions which the three claimants in Holland should have received out of it if no previous payments had been made to them.

As the Atlantic Insurance Company make no claim in this suit, if the sum which would have been their proportion of the fund had they been claimants exceeds what they have received the difference will be distributed amongst the other claimants pro rata.

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This adjustment gives proper effect to the limitation of liability to which the owners of the *Crathie* are entitled under the statute (1) and is in accordance with the only decision to which I have been referred on the subject, namely, the Scottish case of *Rankine* v. *Raschen*. (2)

With regard to the claims for loss of life, there seems to have been some question at one time whether the claimants could make any claim in this suit because they had not brought actions in England under Lord Campbell's Act, and their claims were filed considerably more than a year after the accident; but some of them had sued the owners of the *Crathie* in Scotland, where some of the owners resided, and it was stated to me that, except for the limitation proceedings, the claims can now be made in Scotland, and that the delay has not barred them in that country. Therefore it was conceded before me that the life claimants were entitled to make their claims in these proceedings. These claims exceed the sum of 3209*l.*, and the life claimants seek to resort for the balance of their claims to the fund in Court, namely, 3879*l.* 8*s.*, pro rata with the other claimants. An objection to this was suggested in argument, but this objection was not raised in the notices of motion, and was abandoned, and I therefore accede to this demand of the life claimants (see Williams and Bruce, Admiralty Practice, 2nd ed. p. 382). The only other matter in dispute was as to whether or not the plaintiffs are liable to pay interest on the sum of 3209*l.*, representing 7*l.* per ton on the ship's tonnage. The life claimants contend that the plaintiffs are liable to pay interest on this sum from the date of the collision until it is brought into court for distribution, in the same way as they are liable to pay interest on the sum representing 8*l.* per ton on the ship's tonnage. The plaintiffs, on the other hand, contend that they are under no liability for interest on the sum of 3209*l.* That the owners of a ship claiming to limit their liability in our courts in respect of loss or damage caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503.

(2) (1877) 4 Court Sess. Cas. 4th Series, 725.

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the ship are liable to pay interest on the amount of their liability calculated at 8*l.* per ton on the ship's tonnage from the date of the collision until the date of payment into court has been determined in several cases: see *The Northumbria* (1) and *Smith* v. *Kirby* (2), and cases there cited. The practice of the Admiralty Court upon this point has been invariable. The statute (3) limits the liability to damages beyond the statutory amount; but the interest has to be paid in addition because the payment of the amount is delayed from the date of the loss until the payment into court.

This practice has been followed with regard to the 7*l.* fund in several instances, of which particulars have been furnished to me by the registrar (4) where claims for loss of life have exceeded the limit of the fund, and, in my opinion, this is right in principle. I see no substantial distinction between the two funds. Interest ought to be paid for the delay in bringing in the 7*l.* fund just as much as in the case of the other fund. This places all the claimants in the position in which they would be if their claims were made and dealt with at the time when the liability in respect of them arose, avoids an inconsistency which would exist if the life claimants received no interest on the 7*l.* fund, and yet were to share in respect of the balances of their claims pro rata with other claimants in the interest on the 8*l.* fund, and removes all temptation to the wrongdoer to delay the payments as long as possible.

It was urged that one of the reasons which influenced the learned judges who decided the cases to which I have referred,

(1) (1869) L. R. 3 A. & E. 6.

(2) (1875) 1 Q. B. D. 131.

(3) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503.

(4) *The Victoria* (reported on another point, (1888) 13 P. D. 125). In this case, under a decree dated Oct. 25, 1887, the whole amount of statutory liability (15*l.* per ton), for loss of life and personal injury and for goods, was paid into court in one sum with interest from the date of the stranding of the ship until payment into court.

The Ada Melmore. In this case, under a decree dated May 10, 1887, the amount of statutory liability for goods (8*l.* per ton) was paid into court with interest from the date of the collision until payment, and bail was given to secure payment into court of the additional amount of statutory liability for loss of life, &c., (7*l.* per ton), with interest from the date of the collision until payment.

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to allow interest on the 8*l.* fund was that in the Admiralty Court interest is always allowed from the date of the loss on claims for loss of property, whereas the claims for loss of life are personal claims of a common law nature to which interest should not be added; but I think it is correct to answer that there is nothing to prevent the jury in a common law action (or the registrar and merchants if they are left to assess the claims in Admiralty), from taking into account any delay in payment as part of the damages, so that interest can thus be recovered from the date of the collision: see per Lord Hatherley in *Straker* v. *Hartland* (1) and the *British Columbia Co.* v. *Nettleship* (2), and the cases collected under the title "Interest Recoverable as Damages" in Mayne on Damages. (3)

I understand from the Registrar that his report was intended to be in accordance with the principles I have indicated; but, to prevent any uncertainty in the matter, I direct that the account be adjusted in accordance with my judgment; and, subject to this direction, I confirm the report and I order the plaintiffs to pay into court interest at the rate of 4 per cent. per annum on the sum of 3209*l.* from the date of the collision until that sum is brought into Court.

Solicitors for plaintiffs, the owners of the *Crathie*: *Downing, Holman & Co.*

Solicitors for some of the defendant cargo owners: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendant life and some cargo claimants: *Pritchard & Sons; Clarkson, Greenwell & Co.; Stokes & Stokes.*

(1) (1864) 2 H. & M. 570. (2) (1868) L. R. 3 C. P. 499.
(3) 5th edit. pp. 160, 161.

T. L. M.

[IN THE CONSISTORY COURT OF ST. ALBANS.]

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March 18.

THE VICAR AND CHURCHWARDENS OF GREAT BARDFIELD *v.* ALL HAVING INTEREST.

Ecclesiastical Law—Faculty—Restoration of Chancel Screen—Figures of Our Lord upon the Cross, St. Mary, and St. John—Architectural Decorations not likely to be abused by Superstitious Reverence.

A crucifix with the accompanying figures of the Virgin Mary and St. John is not forbidden by law to be erected on a chancel screen, but may be placed in that position in a parish church under a faculty where the Ordinary is satisfied that it is not likely to be abused by superstitious reverence being paid to it.

A faculty authorizing the restoration in a parish church of a stone chancel screen or interior chancel arch of pre-Reformation date by placing on three existing pedestals springing from ornamental tracery in the upper parts of such screen or interior arch three stone figures without gilding or painting, each two feet three inches high—one, the central figure, representing Our Lord upon the Cross, and the other two representing respectively the Virgin Mary and St. John—was granted by the Consistory Court of St. Albans on the Ordinary being satisfied that the figures would be for the purpose of architectural decoration only, and that there was no ground for reasonable apprehension that they would be abused or made the subject of superstitious reverence.

THIS was a cause of faculty instituted on behalf of the Reverend William Edward Lionel Lampet, the vicar, and Richard Richmond and Thomas Dixon Smith, the churchwardens, of the parish of Great Bardfield, in the county of Essex and diocese of St. Albans, for the purpose of obtaining a faculty "to restore the chancel arch of the church of Holy Trinity, Great Bardfield, by placing on the three pedestals on the said arch the figures of Our Lord on the Cross and St. Mary and St. John," in accordance with a design submitted by Messrs. Bodley & Garner, architects, unanimously approved by a resolution of the parish vestry, and deposited in the registry with the petition to lead the faculty. (1)

(1) The petition alleged that the proposed figures would be of Caen stone two feet three inches in height, and that the estimated cost of the work would amount to 60*l.*, and would be provided for by public subscription.

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Feb. 19. The suit was heard before the Chancellor of the Diocese of St. Albans (A. B. Kempe, Esq.).

The vicar of Great Bardfield gave evidence in support of the petition, and moved for the faculty in person.

No opponent appeared.

Cur. adv. vult.

March 18. THE CHANCELLOR. In this case an application has been made to the Court to decree the grant of a faculty authorizing the vicar and churchwardens of the parish of Great Bardfield, Essex, to restore the chancel screen of the parish church by placing three figures upon it. The application is unopposed, and the parishioners in vestry assembled have unanimously expressed their approval of what is proposed to be done. The application was heard by me at a sitting of the Court held on February 19 last in the vestry of the parish church, and I then had an opportunity of inspecting the church, and of seeing the screen in respect of which the application is made. The latter is an interesting and, I believe, a very uncommon structure. It is of stone, and extends from the ground to the top of the pointed chancel arch. It consists of two mullions which completely divide the arch into three openings, the lower parts of which are unoccupied by railings or other work, and thus afford free access to the chancel, while their upper parts are occupied by ornamental tracery. In the upper part of the central division an opening is left, in which are three pedestals forming an integral part of the structure and of the design of the screen. The central pedestal is slightly higher than those on each side of it, and is at present occupied by an unsuitable wooden cross, the other pedestals being vacant. In the absence of figures on the pedestals the screen unquestionably presents a maimed appearance, while if artistically designed and properly proportioned figures, such as those which it is proposed to erect, are placed on the pedestals, the screen will be an object of considerable interest and beauty.

The screen is of pre-Reformation date, and there can be little doubt that the three pedestals were originally occupied by the

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figures of Our Lord on the Cross, of the Blessed Virgin, and St. John, and that these figures were removed at the general destruction of roods under Queen Elizabeth. There is, however, nothing in the nature of a gallery or loft connected with the screen. The figures which it is now proposed to put up are such as it is supposed were originally there—namely, in the centre the figure of Our Lord upon a Cross with trefoliated ends, and on either side the figures of the Blessed Virgin and St. John, the figures being about two feet three inches in height and of stone. The question which the Court has to consider is whether it can properly sanction the erection of these figures.

From my own inspection of the church, and from the evidence of the vicar, I am satisfied that there is nothing whatever in the building, or in the surrounding circumstances, and will be nothing in the services of the church, which will in any way conduce to the figures being regarded as objects of superstitious reverence; and I believe that the desire of the parishioners and the incumbent is simply to convert a mutilated feature of their church into a complete and sightly one, by restoring it as nearly as possible to the condition in which it was when first erected.

Such being the facts of the case, what is the law applicable to them? The question of the legality of figures such as those under consideration, when placed on a chancel screen, has recently been more than once before the Consistorial Courts, and the decisions have unfortunately not been in harmony with each other, different views having been taken as to the effect of the decision of the Judicial Committee of the Privy Council in the case of *Ridsdale* v. *Clifton*. (1)

The learned Chancellor of the Diocese of Norwich, while in one case—that of *The Vicar and Churchwardens of St. John the Baptist, Timberhill* v. *The Rectors of the Same* (2), where he was of opinion that there were circumstances which brought the case before him directly within the ruling in *Ridsdale* v. *Clifton* (1)—refusing to allow the retention of three figures similar to those now in question on a rood beam in that church, n a subsequent case—that of *The Rector and Churchwardens of*

(1) (1877) 2 P. D. 276. (2) [1895] P. 71.

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Barsham v. *The Parishioners of the Same* (1)—sanctioned the retention of such figures on a chancel screen on the following grounds, namely, that no such circumstances there existed; that the decision of the Judicial Committee in *Ridsdale* v. *Clifton* (2) was "expressly based on the fact that the church in question was one in which were found, not merely an illuminated crucifix, but also the Stations of the Cross, and other acts in the conduct of the services, the illegality of which was not disputed," and that in the particular case before him he could not "hold that these figures, simply placed as they were upon the chancel screen, were of themselves so likely to become objects of superstitious reverence in the present day as to call upon him to refuse to allow a citation to issue."

On the other hand, in the case of *The Vicar of Richmond and Chapelwardens of St. Matthias, Richmond* v. *The Parishioners of the Same* (3), the learned Chancellor of the Diocese of Rochester came to the conclusion that in the case of *Ridsdale* v. *Clifton* (2) the Judicial Committee held that a crucifix "with or without figures placed on the top of a chancel screen cannot, on account of its special history and significance in that position, be regarded as a mere architectural decoration, as it might perhaps be in some other position—as, e.g., in a reredos—and that faculties for crucifixes with or without figures so placed ought not to be granted." The learned Chancellor thought that the question could not "turn on such matters as the presence or absence of candles on the screen, the existence of a rood loft as well as the rood and rood beam, or the presence or absence of other decorations or ornaments forbidden by law, such as the Stations of the Cross." He added: "No doubt details of this kind are mentioned in the cases as assisting the conclusion arrived at; but the main ground of decision has been, I think, what I have indicated."

In the presence of this divergence of opinion, it becomes necessary for me to form an independent judgment on the matter.

The general law with regard to images, pictures, or other representations of sacred persons or objects in churches is well

(1) [1896] P. 256. (2) 2 P. D. 276. (3) [1897] P. 70.

established. It is the "duty of the Ordinary," said the Judicial Committee of the Privy Council in *Ridsdale* v. *Clifton* (1), "so to exercise his judicial discretion in granting or refusing faculties as to guard against things likely to be abused for purposes of superstition"; but, subject to this, it is "important to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Philpotts* v. *Boyd* (2)"—namely, the liberty to erect such representations as are set up for the purpose of decoration only, and as are not likely to have any superstitious reverence paid to them. "I doubt," says Lord Penzance, Dean of the Arches, in *Clifton* v. *Ridsdale* (3), "whether any narrower or more exact definition of what is lawful and what unlawful can, for practical purposes, be framed than that which is set forth in the case of *Philpotts* v. *Boyd*." (2) And in *The Queen* v. *The Bishop of London* (4) Lindley L.J. lays down that, what is "legal or illegal with respect to images, crosses, crucifixes, and other things of the sort in churches, depends on whether they do or do not, or will or will not, encourage or lead to idolatrous or superstitious worship in the place where they are or are to be put."

The nature of the "superstitious reverence" or "worship" here referred to is explained by Lord Penzance in the case of *Clifton* v. *Ridsdale* (5) as follows: It was not, therefore, intended in *Philpotts* v. *Boyd* (2), "by the use of the words 'superstitious reverence,' 'adoration,' or 'worship,' to convey only the limited idea of a figure or object itself worshipped like a pagan idol. On the contrary, I understand these expressions as intended to embrace the far more extended conception of worship, adoration, or reverence paid to the Deity in presence of, or before, those objects or figures. It may not be easy to push definition further than this, and define what it is that in any, or every case, constitutes adoration or worship in presence of an image or figure; nor is it necessary to do so; it is enough for the purpose in hand to say that it must be taken to include all and every form or degree in which the object in question is

(1) 2 P. D. 276, at p. 353.
(2) (1875) L. R. 6 P. C. 435.
(3) (1876) 1 P. D. 358.
(4) (1889) 24 Q. B. D. 213, at p. 237.
(5) 1 P. D. 316, at p. 352.

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made to take a place, or play a part, in the devotions which are paid to the Deity before it."

This being the general law, the question whether any particular representation which it is proposed to set up in a church will be set up for the purposes of decoration only, or is likely to be abused, or to be the subject of superstitious reverence, worship, or adoration, appears to me to be a question of fact, to be determined upon a consideration of all the circumstances of the case, "each case standing upon its own circumstances": per Lord Penzance in *Clifton* v. *Ridsdale*. (1) Thus "it is to be presumed," said that learned judge in the case referred to, "that the Court of Appeal would not hesitate to adjudge even painted windows, or paintings portraying" the crucifixion "to be unlawful, if it was satisfied from the mode in which the subject was treated, the place which they occupied, or other the incidents or surrounding circumstances, that they were in real danger of adoration, worship or superstitious reverence."

On the other hand, in the subsequent case of *Hughes* v. *Edwards* (2), the same learned judge ordered a faculty to issue for the erection of a sculptured representation of the crucifixion immediately over the Holy Table in a parish church; notwithstanding the fact which was urged upon him that according to the usage of the Church of Rome a crucifix has always been required to be placed on the altar during the celebration of mass, unless there already be such a figure in the reredos. The following passage is from the judgment in that case. "It was argued accordingly, that the figure of Christ on the Cross contained in the central compartment of the sculpture which is under consideration would if in a Roman Catholic church properly supply the place of a crucifix upon the altar, and it was sought to be inferred therefrom that such a decoration was likely, in the Protestant church now under consideration, to fulfil the same office as in a Roman Catholic church, and was therefore in danger of abuse." (3) As to the argument, Lord Penzance thought that it was clear that such a thing might be; but that was not enough: it must appear to the Court that it

(1) 1 P. D. 316, at p. 358. (2) (1877) 2 P. D. 361.
(3) 2 P. D. 361, at p. 369.

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was probable, and, being of opinion that the disputed sculpture was unquestionably in its character an architectural decoration, a fitting and natural architectural ornament, proposed to be placed in a part of the church where ornaments of the kind are not unfrequently found, and not an isolated figure, but a group capable of artistic treatment, asked, "Why then, without more, why without further evidence, should the probability of its abuse to superstitious purposes be declared to be established?" and concluded his judgment as follows: "Dispassionately considered, the circumstances of the case require me to declare that the illegality of this decoration is not established, and that a faculty for its erection ought to be granted."

These authorities appear to me clearly to establish the necessity for the consideration by the Ordinary of all the circumstances of each case as it comes before him, and of giving due effect to the differences which may exist between different cases. When such consideration has been duly given, it may of course be that some one circumstance may prove to be of such paramount importance as to outweigh all others together. Does any such circumstance exist in the case of representations of the crucifixion upon chancel screens which should compel me to come to the conclusion that under no circumstances should such a representation be sanctioned?

The only case in which the question of the lawfulness of the erection of figures upon a chancel screen has come before the appellate tribunals is that of *Clifton* v. *Ridsdale* (1), which requires unquestionably the most careful consideration. The Courts had there to deal with the case of an isolated crucifix, not placed "in association with other figures and as embodying the scene of the crucifixion," but "by itself, standing alone, without incidents or adjuncts," (2)—a case "where the crucifix could hardly be said to constitute an architectural decoration at all, or, at any rate, did not appear to the Court to have been set up for that purpose": per Lord Penzance in *Hughes* v. *Edwards*. (3) This crucifix surmounted a chancel screen, standing at the middle of it where it rose to a peak, and was illuminated by

(1) 1 P. D. 316, 359; 2 P. D. 276, 349.

(2) 1 P. D. 359.

(3) 2 P. D. 368.

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a row of candles which at distances of nearly a foot apart were continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles were lighted the crucifix would stand in a full light.

Dealing with these facts, and with the circumstances, (1.) that the crucifix with images at the base, was commonly erected in our parish churches before the Reformation on a structure called the rood loft, traversing the church at the entrance to the chancel, and occupying a position not otherwise than analogous to that which the iron screen did in the case; (2.) that such crucifixes were set up not as mere architectural ornaments, but as objects of reverence and adoration; (3.) that this reverence of them was actually enjoined; (4.) that they were destroyed as monuments of idolatry and superstition during the reign of Elizabeth, (5.) and that the adoration of them still continues in the Church of Rome, Lord Penzance came to the conclusion that there was a just and reasonable apprehension that the crucifix under consideration would be the subject of superstitious reverence, and that it was not set up as a mere architectural decoration.

Having come to this conclusion, the learned judge proceeded to indicate the unlawfulness of the Stations of the Cross as found in the same church, and continued:—

"It will be observed that in dealing with the question of lawfulness both as regards these Stations of the Cross and the crucifix, I have hitherto excluded from view all conclusions to be drawn from the manner in which the respondent has been in the habit of conducting the services of his church. At the same time, it is obvious enough that the probability of both the crucifix and the Stations of the Cross being turned to superstitious uses is largely augmented by the fact that they have been set up by a clergyman who celebrates the Holy Communion with a mixed chalice and wafer bread, and, with a 'biretta' on his head, accompanies a procession round his church with banners, crosses and acolytes in red cassocks, in apparent imitation of the Church of Rome. But the structure or ornament of a church is more or less a thing of permanence, while

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the ministrations of a particular clergyman are more or less temporary, and if sound objections exist, as I think they do in this case, to the objects complained of, in themselves, those objections constitute the best, because the most permanent, basis for their condemnation and removal." (1)

So far as the crucifix is concerned, I understand the condemnation by Lord Penzance of it as objectionable in itself to refer to that crucifix "so placed and lighted" (2) as it was in the case before him.

On appeal to the Judicial Committee the decision of the Dean of the Arches was affirmed, but, in view of the express intimation which I have quoted that his condemnation of the crucifix and Stations of the Cross rested upon the objections which existed "to the objects complained of in themselves," and that he had purposely excluded the other circumstances of the case from the grounds upon which he based his decision, it is most material to notice the way in which the considered judgment of the Judicial Committee dealt with the matter. Their Lordships pointed to the fact that the charge of having unlawfully set up and placed upon the top of the screen separating the chancel from the body of the church a crucifix and twenty-four metal candlesticks, with candles which were lighted on either side of this crucifix, was accompanied by two other charges, in respect of which the appellant had been admonished to abstain from the acts complained of, and to which part of the monition he had submitted. One of the charges was for having formed and accompanied a procession from the chancel, down the north aisle and up the nave back to the chancel again, on the occasion of public service, those taking part in the procession at one time falling upon their knees and remaining kneeling for some time. The other charge was the setting up, attached to the walls of the church, representations of figures, in coloured relief, of plastic material, purporting to represent scenes of our Lord's Passion, and forming what are commonly called Stations of the Cross and Passion, such as are often used in Roman Catholic churches.

The Judicial Committee then proceed to deal with the

(1) 1 P. D. 361, 362. (2) 1 P. D. 353.

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judgment of the Dean of the Arches. They point out that the learned judge refers to two decisions of the Judicial Committee which had a material bearing upon the question, namely, *Liddell* v. *Westerton* (1) and *Philpotts* v. *Boyd*. (2) With regard to the first of these, they quote the words of the learned judge as follows: "The Court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the judgment to point out that crosses were to be distinguished from crucifixes, saying that 'there was a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix,' the former of which they said had been 'used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced.'" They state that "the learned judge then proceeds to consider whether it would be right to conclude that the crucifix in the present case was set up for the purpose of decoration only; whether it is in danger of being abused, and whether it could be suggested that superstitious reverence had been, or was likely to be, paid to it." Their Lordships then refer to the statements of the learned judge as to the history of the crucifix as formerly set up in our churches on the rood loft, and to his "conclusion that the crucifix so placed formed an ordinary feature in the parish churches before the Reformation, and that it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration." They allude to his indication that the worship of it was enjoined in the Sarum Missal, and add that a similar injunction is to be found in the "Order for the Communion according to the Hereford Use." The judgment of the Judicial Committee then proceeds as follows:—

"Proceeding on these considerations and dealing with a church in which was found, not merely an illuminated crucifix, but also those Stations of the Cross and other acts in the conduct of the services, the illegality of which the appellant does not challenge in this appeal, the judge continues thus:—

"'It is no doubt easy to say, what proof is there of danger of idolatry now? What facts are there to point to a probability of abuse?' "'But when the Court is dealing with a well-

(1) (1855) Moore's Special Report. (2) L. R. 6 P. C. 435.

known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation in a particular part of the church, and for the particular purpose of "adoration"—when the Court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after a lapse of three hundred years, it is suddenly proposed to set up again this same object, in the same part of the church, as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in "decoration" may end in "idolatry."'"

"'If this apprehension is a just and reasonable one, then there exists that likelihood and danger of "superstitious reverence" which the Privy Council in *Philpotts* v. *Boyd* (1) pronounced to be fatal to the lawfulness of all images set up in a church.'"

"In these observations of the learned judge their Lordships concur, and they select them as the grounds of his decision which commend themselves to their judgment. They are prepared under the circumstances of this case to affirm the decision directing the removal of the crucifix, while at the same time they think it important to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Philpotts* v. *Boyd* (1), subject to the power and duty of the Ordinary so to exercise his judicial discretion in granting or refusing faculties as to guard against things likely to be abused for the purposes of superstition."

Now it is certainly not easy to see what conclusion should be drawn from the somewhat unusual way in which the Judicial Committee deal with the circumstances which were deliberately treated by the Dean of Arches as unnecessary to his decision. But while on the one hand, in the absence of any express declaration by their Lordships that the decision of the learned judge could only be justified by the existence of those circumstances, I cannot think that they intended so to hold, it does on the other hand appear to me that by their express inclusion

(1) L. R. 6 P. C. 435.

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of these circumstances among those which they regarded as justifying that decision, by their declaration that "under the circumstances of this case" they were prepared to affirm the decision directing the removal of the crucifix, and by their cautious warning that, while so doing, they deemed it important to maintain the liberty established in *Philpotts* v. *Boyd* (1), the Judicial Committee desired to emphasize the importance of not condemning any representations of sacred persons and objects in a church unless, having regard to all the circumstances of the case, it appears to the Ordinary that they are not put up for purposes of decoration only, and are likely to be the subject of superstitious reverence. At any rate, I cannot persuade myself that their Lordships had any intention to decide, nor do I think that the Dean of the Arches had any intention to decide, that under no circumstances whatever could a representation of the crucifixion on a chancel screen be lawful. I cannot, therefore, regard the decisions in *Clifton* v. *Ridsdale* (2) as relieving me of the responsibility of deciding whether in this case the proposed figures are to be erected as an architectural decoration only, and whether they are likely to be the subject of superstitious reverence.

The Court has not, however, in this case to deal with the general question whether, in the absence of such special circumstances as here exist, the erection upon a chancel screen of a figure of the crucified Saviour, with the accompanying figures of the blessed Virgin and St. John, ought to be sanctioned. In the determination of that question there are, as it seems to me, two opposing considerations which would require to be most carefully weighed. On the one hand, it would appear to be most material to bear in mind that, while the Church of England before the Reformation, not merely sanctioned, but, as pointed out in *Clifton* v. *Ridsdale* (2), actually enjoined that adoration of the crucifix, a practice to which the Church of Rome still adheres, in the Church of England any such "superstitious reverence" is now, and for over three hundred years has been, regarded as "a fond thing vainly invented and founded upon no warranty of Scripture, but rather repugnant to the

(1) L. R. 6 P. C. 435. (2) 1 P. D. 349; 2 P. D. 349.

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Word of God" (Thirty-nine Articles of Religion, Article 22), so that any practices or preaching on the part of the clergy which would tend to the encouragement of such superstitious reverence would be contrary to law. In view of this attitude of our Church, it would seem clear that in the absence of any practices or environment conducive to the payment of such superstitious reverence, or indicating the likelihood of its existence, the probability of its now being paid is not lightly to be assumed.

On the other hand, a consideration of the case of *Ridsdale* v. *Clifton* (1) must lead the Court to ask: "Why, in view of the history of such figures in such a situation, is it desired to set them up in this particular place?" And where the reply is merely, "It is for purposes of architectural decoration only," the same consideration must in general give rise to a just and reasonable apprehension in the mind of the Ordinary whether he can properly come to the same conclusion.

Under the special circumstances of the case now before me—and it is with that case alone that I have to deal—I can, however, see no reason for doubting the sufficiency of the reply; and I cannot consider that those circumstances would justify a judicial decision that there is ground for such a just and reasonable apprehension of abuse or superstitious reverence as ought to lead me to declare that these figures would not be lawful.

Coming as I do to this conclusion, I must declare that a faculty ought to be granted for the erection of the three figures, for I can see no grounds for concluding that, though the figures are lawful, it would be a proper exercise of my judicial discretion to refuse to sanction them.

There will be a decree that a faculty is to be granted for the erection upon the three pedestals of the three stone figures, without gilding or painting, in accordance with the design deposited with the petition.

(1) 1 P. D. 316; 2 P. D. 276.

C. F. J.

1897
March 16.

[IN THE CONSISTORY COURT OF WAKEFIELD.]

The Office of the Judge promoted by HOWELL *v.* HOLDROYD.

Ecclesiastical Law—Jurisdiction — Criminal Suit against Churchwarden—Duty of Churchwarden with respect to Collections at Morning and Evening Service—Alms Dish—Usage of Church—Control of Churchwardens over Moneys collected for Church Expenses.

By the accustomed practice of a parish church, when collections from the congregation were made either at the morning or the evening service on Sundays, the collecting bags were brought after the collection up to the chancel steps and placed in the alms dish there held by the minister for the purpose of receiving the same and placing them on the Communion Table. One of the churchwardens of the parish was charged in a criminal suit with having committed offences against ecclesiastical law in that during the time he held office he had at the morning service on one Sunday and the evening service on another Sunday vexatiously refused to place the bag in which he had collected money from the congregation in the alms dish in accordance with the above practice. At the hearing these charges were sufficiently proved:—

Held, that, in so deviating from the practice in use in the matter, the respondent had offended against the laws ecclesiastical, and that he ought to follow such practice for the future unless otherwise ordered by the bishop.

Where collections for ordinary church expenses are made at the morning and evening services in parish churches, the churchwardens are the proper custodians of the moneys collected, and such moneys should be placed by them at a bank to an account in their joint names.

Semble: For unreasonably refusing to sign a joint cheque on such account for the payment of proper church expenses a churchwarden is liable to be articled in a criminal suit in the Ecclesiastical Court.

In this case the office of the judge was promoted by the Rev. Alfred James Howell, Clerk in Holy Orders, vicar of the parish of Wyke, in the county of York and diocese of Wakefield, against Isaac Holdroyd, one of the churchwardens of the same parish. The charges against the respondent, as particularly alleged in the citation, were "for having from time to time since May 24, 1896, on divers Sundays whilst acting as churchwarden in the parish church of Wyke, after collecting moneys on Sundays at the morning and evening service, wilfully and vexatiously taken such moneys away from the said church and

refused to deliver the same up to the vicar of the parish of Wyke for the purpose of their being applied, or to apply them himself, for the purpose for which they were collected; for having on Sunday, November 8, 1896, after collecting at the evening service certain moneys, vexatiously refused to place the same in the alms dish pursuant to the orderly practice observed in the said church; for having on Sunday, November 22, 1896, during and after the services of the said church, been guilty of the aforesaid offences, and for having on the several occasions aforesaid wilfully and without reasonable cause disregarded the lawful directions of the vicar of the said parish."

An absolute appearance having been entered on behalf of the respondent (1), articles were brought in on February 4, 1897. They are, so far as material to this report, set out in the judgment, together with the result of the evidence adduced at the hearing.

Feb. 15, 16. The cause was heard before the Chancellor of the Diocese of Wakefield (Dr. Tristram, Q.C.).

Harold Hardy, for the promoter. The acts proved to have been done by the respondent amount to offences against ecclesiastical law, and the Court ought to admonish him not to repeat them. The practice of Wyke church as to the collecting bags at the morning and evening service being placed in the alms dish is a matter which had the sanction of the promoter, and as to which, subject to the directions of the Ordinary, he as the incumbent of the parish had the sole control; the respondent having no powers or rights enabling him to interfere or deviate from the practice in any way: *Hutchins* v. *Denziloe*. (2) The respondent had equally no right to interfere with or carry away any of the money collected at the morning or evening service collections. Such moneys are in no sense moneys the goods of the parish over which the churchwardens of the parish have any right of custody or control. Collections made in church other than collections at the

(1) An affidavit to lead the citation was made by the promoter, and a copy of this affidavit was served on the respondent together with the citation.

(2) (1792) 1 Hagg. Cons. 170, 173, 174.

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Communion Service, as to which there is a special rubric, are, even if made for church expenses, made on the initiative of the incumbent, and in response to a request from him, and the fact that the clergy are accustomed to pay over the collections for church expenses to the churchwardens for purposes for which a church rate would formerly have been levied cannot give the churchwardens any right to be the custodians of them before the incumbent, who in all cases is subject to the directions of the Ordinary, hands them over. [He relied on *Reg.* v. *O'Neill.* (1)]

James J. Wright, for the respondent. There is no rubric, canon, or formulary of the Church of England with respect to collections at morning or evening service. Any practice in the matter at Wyke Church is not of such binding obligation that an offence against ecclesiastical law was committed by the respondent refusing to comply with its terms. It must be admitted to have been intended by the congregation in Wyke Church that the sums collected on the occasion of the collections referred to in the articles should be applied by the churchwardens towards defraying the church expenses in accordance with the duty cast on them by their office, and the respondent has done nothing which can be construed as a breach of this duty. [As to the duties of churchwardens on this point, he cited Canon 89 of the Canons of 1603; Prideaux, Churchwarden's Guide, pp. 100–108, 313; Blunt, The Book of Church Law, p. 270; *Leman* v. *Goulty.* (2)] Moreover, the respondent has always been willing that any money now remaining in his hands from the collections should be applied by him in payment of the expenses for which he is liable as churchwarden.

Cur. adv. vult.

March 16. DR. TRISTRAM. The promoter of this suit is the Rev. Alfred James Howell, who has been vicar of the parish of Wyke in this diocese since October, 1892. The respondent is Mr. Isaac Holdroyd, who was elected on April 11, 1896, after a poll, the people's churchwarden, by a majority of three

(1) (1867) 31 J. P. 742. (2) (1789) 3 T. R. 3.

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to one. The promoter in the articles complains that the defendant has been guilty of the following offences against ecclesiastical law.

(1.) That in breach of his duty as churchwarden and in defiance of the lawful order and directions of the vicar, after acting as churchwarden in the collection of moneys during morning and evening service on Sundays, he was guilty of having wilfully and vexatiously taken away such moneys from the church, and refused to deliver the same up to the vicar for the purpose of their being applied, or to apply them himself, for the purposes for which the said moneys were collected.

(2.) That during the Sunday evening service on November 8, 1896, the defendant, after collecting the moneys, instead of according to the practice that had been approved of and had prevailed in the church of bringing the collecting bags after the collection up to the chancel steps and placing them in the alms dish there held by the minister for the purpose of receiving the same, and who was there waiting to receive the same, and for the purpose of placing them on the Holy Table, and of their being subsequently conveyed to the vestry for the purpose of being there counted, vexatiously refused to place the same in the said dish, thereby causing scandal and obstructing the said practice, and interfering with the due course and order of divine service, and took the said moneys into his pew at the west end of the church, and afterwards wilfully and vexatiously took the moneys away from the church and refused to deliver the same up to the vicar for the purpose of their being applied, or to apply them himself for the purposes for which they were collected.

(3.) That after collecting the moneys during the morning service on Sunday, November 22, 1896, he was guilty of a similar offence.

The promoter concludes the articles by asking the Court to admonish the defendant to deliver up to the vicar the moneys so collected or their equivalent, and to refrain from so offending in future, and that he be suspended from or deprived of the office of churchwarden for having so offended.

In his evidence the defendant admitted that for several years

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previous to his entering on the office of churchwarden the practice that had prevailed in the church in respect of placing the collecting bags in the dish held by the minister on the chancel steps, and their subsequent conveyance to the vestry, was as alleged in the articles, and that at the Sunday evening service on November 8th, and at the Sunday morning service on November 22 last, he had for the first time deviated from such practice without the vicar's sanction.

But his counsel submitted that these collections, not being offertory collections at the Communion Service, but collections for church expenses, the directions in the rubric immediately following the offertory sentences for the churchwardens reverently to bring the bags in which the alms have been collected to the priest, who is humbly to present and place them on the Holy Table, does not govern these collections, and that as neither the rubrics nor canons contain any regulations for such collections, the charge against the defendant of having violated the ecclesiastical law in the course he took could not be sustained.

The answer to this is that the office of a churchwarden in such a matter "is one of observation and complaint, but not of control, with respect to divine worship": *Hutchins* v. *Denziloe* (1), and that if on entering office he finds a practice such as this established, and to which no legal objection can be taken, his duty is to continue it, and if he considers it objectionable or inconvenient it is no part of his duty to take the law into his own hands and of his own mere motion to alter it, but he should refer the matter to the bishop, as is directed in the preface to the Prayer-book concerning the service of the Church, namely, that when any doubts arise thereon "resort is to be had to the bishop of the diocese, who by his direction shall take order for the quieting and appeasing of the same; so that the same order be not contrary to anything contained in the book."

In deviating from the prevailing practice in this matter without the bishop's order, the Court is of opinion that the defendant committed an offence against the laws ecclesiastical, which might cause scandal to members of the congregation,

(1) 1 Hagg. Cons. 173.

and is one which he ought not to continue, except under order from the bishop.

In determining as to the form of the order which should be made in this case, the Court cannot lose sight of the circumstances which led to the defendant making the deviation in question.

By the evidence it appears, that there are two different theological parties in the parish, both of whom are attached members of the National Church, a party who dislike ornate ritual, of which the defendant is a prominent member, and a Ritualistic party, which the vicar's proclivities and opinions more or less favour. It is due, however, to the vicar to say that according to the evidence he has conducted the Sunday morning and evening services in such a manner as to give no offence to the former party. The origin of the present litigation, as appears to the Court, arose not so much owing to the theological differences between these two sections, but to a difference of opinion between the vicar and Mr. Varley his churchwarden on the one hand, and the defendant as the people's churchwarden on the other hand, as to who should have the custody of and control of the moneys collected in the church for church expenses, and to an assertion by the vicar of his right to exclude the defendant from entering the vestry during the counting of the moneys collected in the church.

There are only two cases that I am aware of that have a material bearing on this part of the case, the case of *Hutchins* v. *Denziloe* (1), in which Lord Stowell said, as to the duties of churchwardens, "I conceive, that originally they were confined to the care of the ecclesiastical property of the parish, over which they exercise a discretionary power for specific purposes," and an important decision of the Queen's Bench in *Reg.* v. *O'Neill*, delivered in 1867. (2)

In that case the Rev. James O'Neill, the defendant, was vicar of Luton, and Samuel Oliver, the complainant, was one of the churchwardens of the parish. On Sunday, May 5, 1867, the vicar gave notice in church that a collection would be made the following Sunday, May 12, to defray certain

(1) 1 Hagg. Cons. 173. (2) 31 J. P. 742.

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expenses incurred by him in providing chairs for the accommodation of the parishioners. The collection was made at the morning service, and Oliver, who assisted in counting the money in the vestry after the service, seized some of the money for the avowed purpose of applying it to some other purpose. The vicar interposed to prevent him from taking more, and he declared he would seize some money in the evening. The collection for the same purpose was made in the evening, and the money was taken by the vicar and curate into the vestry. Oliver then forced his way into the vestry after the vicar had told him he was not wanted, when the vicar tried to put him out. Oliver preferred before the local justices two charges of assault against the vicar. The justices dismissed the first charge and refused to hear the second one. Oliver applied for a mandamus to compel the justices to hear the charges. The mandamus was refused, and Cockburn L.C.J. in delivering judgment said, "According to my view of the facts no rule should be granted." "This was not money raised for purposes connected with the church, which the churchwarden had any right or duty to take charge of, but it was money raised and collected for a different object and in aid of a charity carried on by the vicar. And if, therefore, the churchwarden desired to get hold of it, it was to apply it to a different purpose, which he had no right to do. It was not unlawful for the vicar to make such a collection, and, having done so, he was in lawful possession of the money. The churchwarden had no right whatever to attempt to lay hold of the money to apply it to a different purpose."

In the same case Blackburn J. said: "It would be an error to imagine that a churchwarden had necessarily at all times a right to enter the church or vestry. He had only a right to do so at proper times and for proper purposes, and if his object was to seize money he had no right to seize, then he had no such right; and if so, then the vicar might lawfully resist his entry."

Shee and Lush JJ. concurred.

The circumstances that preceded the litigation in the present case, and in part laid the foundation of it, are of follows:—

The collections made at the morning and evening Sunday services, which average 12*s.* 6*d.* at each collection, are appro-

priated to church expenses. When notice is given of a collection for any special object 12*s.* 6*d.* is deducted from each collection for church expenses under an arrangement made by the vicar and the churchwardens. When there is a difficulty in otherwise meeting the church expenses, an arrangement such as this ought in my opinion to be adopted. The collections having been in this parish in previous years insufficient for church expenses, the balance was met by private contributions. On the defendant assuming office he consented to Mr. Varley being treasurer, adding that he himself would only be personally liable for the amount collected in the church, and not for the salaries of the organist, choir-master, and organ-blower (they being appointed by the vicar, who himself fixed their salaries), beyond the balance remaining after payment of the expenses incurred in cleaning the church, for coke and coal for warming it, and for gas for lighting it, and for the verger's salary, which expenses were, he maintained, the first charge on this fund.

To this Mr. Varley demurred, considering that quarterly payments should also be made out of the fund in respect of these salaries. It was also arranged that the duty of collecting in the church should be performed by the churchwardens on alternate Sundays. The defendant paid over to Mr. Varley, as treasurer, the collection made by him on the first two Sundays of his turn for collecting; but from May 24 to November 22 he retained possession of the moneys collected by himself for the purpose of meeting the expenses for which he was personally liable.

His adoption of this course occasioned friction between himself and the vicar and his co-churchwarden, and led to the vicar claiming a right to exclude him from the vestry to count the money collected.

It is in conformity with the ruling of the Queen's Bench in *Reg.* v. *O'Neill* (1), as expressed by Lord Blackburn, that the defendant was clearly entitled to enter the vestry on this occasion without the vicar's permission for the purpose of assisting in counting a collection made for church expenses.

The next occasion on which any serious friction took place in the vestry between the vicar and the defendant was after

(1) 31 J. P. 742.

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the evening service on Sunday, November 8, when the vicar called upon the defendant to deliver over the moneys he had collected to himself for the purpose of his handing them over to Mr. Varley as treasurer—which the defendant in the opinion of the Court was entitled by law to refuse to do for reasons to which the Court will presently advert.

On December 4 there was a meeting of the vicar and the churchwardens at which the defendant proposed that the money in their respective hands should be placed at a bank in their joint names to be drawn out by cheques signed by them jointly. To this proposal the vicar and Mr. Varley objected, as being inconvenient and a departure from the former practice by which one of the churchwardens had acted as treasurer.

The defendant's proposal was in the opinion of the Court a very reasonable one, and one which should have been accepted as being the only way by which he could protect himself from his personal liability for the due expenditure of the moneys collected for church expenses.

It was pointed out by the counsel for the defendant that in any action brought against him for money expended on the church, on its being shewn that sums had come into the hands of the churchwardens sufficient to meet such expenditure and had not been exhausted, it would be no answer for him to say that he had handed it over to his co-churchwarden as treasurer, and that his co-churchwarden alone as treasurer was liable for the debt. I take it that the law is so.

I am aware that there has been a case in this diocese in which the refusal of one of the churchwardens to sign a joint cheque for the payment of church expenses without reasonable cause was the occasion of much annoyance.

The remedy in such cases is to article the churchwarden in the Ecclesiastical Court and obtain an order admonishing him to sign the cheque, with condemnation in the costs of the suit.

The Court is asked by the promoter to admonish the defendant to deliver up to him the moneys referred to in the articles or their equivalent.

This the Court would not be justified in doing, as the churchwardens are the proper custodians of moneys collected for ordinary church expenses.

The Court is also asked to admonish him for having deviated from the accustomed practice of bringing up the collection bags to the chancel steps, and placing them in the dish there held by the minister for that purpose. The order that the Court is prepared to make on the defendant, his counsel having expressed his willingness to abide by the Court's directions on this point, is that he should follow the accustomed practice in this matter until the bishop shall otherwise order, and that he appropriate the small balance he still retains out of the collections in payment of accounts for which he undertook to be liable.

As both parties have acted in this case under a misconception of their lawful rights, the Court will make no order as to costs, leaving each party to pay his own costs. (1)

Solicitors for promoter: *Brooks, Jenkins & Co.*
Solicitors for respondent: *Wright & Co.*

(1) The minute of the decree entered in the registry was, omitting immaterial portions, as follows: "The judge . . . . decreed that the promoter had failed in establishing that the said Isaac Holdroyd, for having, as charged in the said articles, refused to deliver up to him, as vicar of the parish of Wyke, although required by him so to do, certain moneys collected in the parish church of Wyke for church expenses, for the purpose of their being applied for the purposes for which they were collected, and for having taken away the money from the said church, had been guilty of an offence against the laws ecclesiastical; but that he had sufficiently proved so much of the said articles as charged the said I. Holdroyd with having offended against the laws ecclesiastical by having, at the Sunday evening service held in the said parish church of Wyke on November 8, 1896, and, at the Sunday morning service held in the said parish church on November 22, 1896, departed from the practice theretofore prevailing in the said church of taking up the collecting bags after the collection to the chancel steps and there placing them in a dish which was on each of such occasions there held by the minister for the purpose of receiving the same, and for the purpose of placing them on the Holy Table, and of their being subsequently conveyed to the vestry for the money to be there counted, and instead thereof taking the said moneys into his own pew. And the . . . . judge decreed and ordered the said I. Holdroyd, as one of the churchwardens of the said parish of Wyke, in the future to follow the accustomed practice in the said church as pleaded in the articles, and also decreed and ordered the said I. Holdroyd to appropriate the balance of the moneys collected in the church for church expenses that remained in his possession . . . . in the payment of church expenses for which he was personally liable."

C. F. J.

1897
April 29.

[IN THE CONSISTORY COURT OF LONDON.]

In re THE MATTER OF THE LOG OF THE MAYFLOWER.

Ecclesiastical Law—Power of Ordinary to make Orders as to the Custody and Disposal of Records deposited amongst Archives of Diocese—Document of special Historical Interest to Citizens of Foreign Sovereign State—Comity—Delivery up for transmission to Massachusetts of Manuscript History of Voyage of "Mayflower" and Plymouth Plantation, containing Entries of Births, Deaths, and Marriages.

On the petition of the Ambassador of the United States of America, the Chancellor of the Diocese of London directed that the manuscript known as "The Log of the *Mayflower*," and containing the history of the voyage of that vessel to America in 1620 and of the then new-founded Plymouth plantation, together with entries of the births, marriages, and deaths of many of the first settlers in New England and their immediate descendants, should—as a record of the greatest national interest and importance to the President and citizens of the United States—be delivered out of the custody of the officials of the See of London to the Ambassador for the purpose of being transmitted to America, and there deposited under the official custody of the Governor of Massachusetts for the time being, on the conditions that a photographic facsimile reproduction of the manuscript, verified by affidavit, should be deposited in the registry of the Consistory Court of London, and that all proper facilities should be afforded by the future custodians of the original to persons desiring to make searches therein or of obtaining extracts therefrom, and that a certificate of the due delivery thereof, signed by the Governor of Massachusetts, of having received it, and testifying his acceptance of its custody on the conditions imposed, be transmitted to the registrar.

The Ambassador of the United States having ceased to hold office since the decree was made, the Court did not think fit to vary the decree; for in taking charge of the manuscript he was to act not as ambassador, but as the personal delegate of the Court.

THIS was a petition of the Honourable Thomas F. Bayard, Ambassador Extraordinary and Plenipotentiary in London of the United States of America, "for and on behalf of the President and citizens of the said States," praying that a certain manuscript book in the library attached to Fulham Palace, containing an account as narrated by one of the company of Englishmen who left England in April, 1620, in the ship *Mayflower*, of the circumstances leading to the prior settlement of

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that company at Leyden in Holland, their return to England and subsequent departure for New England, their landing at Cape Cod in December, 1620, settlement at New Plymouth, and later history for several years, and being in the opinion of the petitioner of the greatest importance and value to the citizens of the United States of America as one of the earliest records of their national history, and supplying much valuable information in regard to the original settlers in the States, their family history and antecedents, should be delivered by the Court to the petitioner, he undertaking "to use every means in his power for the safe transmission of the said book to the United States of America, and its secure deposit and custody in the Pilgrim Hall at New Plymouth, or at such other place as might be selected by the President and Senate of the United States of America, and upon such other conditions as to security and access by and on behalf of the English nation as the Court might determine."

It appeared from an affidavit of March 22, 1897, made by the legal secretary of the Bishop of London verifying the petition, that the Bishop of London consented to the handing over of the manuscript book referred to in the petition upon such conditions as should be deemed proper by the judge of the Consistory Court of London. (1)

March 25. The petition was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.). (2)

The original manuscript book was produced in Court, and evidence was given by which it appeared that the registry at Fulham Palace was a public registry for historical and ecclesiastical documents relating to the diocese of London and to the Colonial and other possessions of Great Britain, so long as such possessions remained by custom within that diocese.

Arnold Statham, for the petitioner. The Court, as having

(1) At the foot of the petition there was written as follows: "I concur in this petition.—M. Londin."

(2) The Court sat in the Consistory Court in St. Paul's Cathedral.

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the control and custody of the records and documents deposited in the diocesan registry or with the officials of the See of London, is asked to grant the prayer of the petition as a matter of discretion and upon grounds of public policy. The application is made with the concurrence of the Bishop of London, and it has the unanimous support of the American Antiquarian Society, the Historical Society of Massachusetts, the Pilgrim Society of Plymouth, and the New England Society of New York, acting with the co-operation of the Governor of the Commonwealth of Massachusetts. It is not known how the manuscript book the subject-matter of the application, and commonly called "The Log of the *Mayflower*," came to be deposited at Fulham Palace; but two suggestions have been made, one that the book was brought to England just before the breaking out of the revolutionary war by Thomas Hutchinson, Governor of Massachusetts, and ultimately placed at Fulham; another that it was carried off from the Prince Library at Boston, Massachusetts, by the British Army under Sir William Howe, or by some person in their company, when that town was evacuated in March, 1776. By whatever means, however, the book came into the custody of its present possessors, it is clear that no private rights will be infringed by its transmission to America, and that there would be an eminent propriety in the Court delivering to the authorities of the United States of America what must always be most highly valued by the people of that country as a portion of their earliest national archives. It may be instanced, as in the nature of a precedent to guide the action of the Court, that so recently as 1867 five volumes of manuscripts presented to the Library Company of Philadelphia in 1799 and found on examination to consist of official correspondence relating to Ireland, many of the letters bearing the sign-manual of James II. and one of Elizabeth, were restored by the directors of that Library to Her Majesty's Government. If the petition is granted the petitioner will undertake that a photographic facsimile of the manuscript in question, the accuracy of which shall be verified by affidavit, shall before the delivery to the petitioner of the original be left with the registrar for deposit in the diocesan registry, and also that a duplicate of the same

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photographic facsimile shall be placed in the Fulham Palace Library. (1)

DR. TRISTRAM. The Hon. Thomas F. Bayard, the Ambassador Extraordinary of the United States of America to the Court of St. James's, has petitioned this Court on behalf of the President and citizens of the United States of America to decree that an original manuscript book known as "The Log of the *Mayflower*," in the custody of the Court, be delivered to His Excellency for safe transmission to the President and Senate of the United States upon such conditions and security as the Court may determine.

This manuscript book (amongst other matters of great historical interest) contains what in law is an authentic register between 1620 and 1650 of the names of the persons who founded in 1620 the colony of New England in North America, of the fact of their marriages, with the names of their respective wives and of their children, the lawful issue of such marriages, and of the marriages of many of their grandchildren, and of the issue of such marriages, as well as of the deaths of persons therein named. It is in its character of being an authentic register of marriages, births, and deaths of persons resident in a territory which formed part of the Colonial possessions of Great Britain at the dates to which they relate, and which was by custom then within the diocese of London, that the custody of this manuscript belongs to the Court.

The authenticity of the manuscript as being (with the exception of the four last entries on the last page) in the handwriting of Major William Bradford, one of the founders and the second Governor of the Colony, is placed beyond doubt from the inherent evidence furnished by its contents, and by the fact of the whole of its contents, with the above exceptions, being in

(1) This photographic facsimile reproduction has been published under the following title, "The History of the Plimoth Plantation written by William Bradford . . . . with an introduction by John A. Doyle." Ward & Downey, London, 1896. See also the Collections of the Massachusetts Historical Society for 1856 and "The Story of the Pilgrim Fathers" [1606–1623] . . . . edited from the original texts by Edward Arber, F.S.A. Ward & Downey, London, 1897.

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his handwriting, as well as by an entry prefixed to it in the handwriting of his grandson Samuel Bradford. The following head-note in Major Bradford's handwriting is prefixed to the register, which is contained in the last pages of the book:—

"The names of those which came over first in 1620, and were (by the Blessing of God) the first beginners, and, (in a sort,) the foundation of all the Plantations and Colonies in New England and their families."

Then follow twenty-seven separate entries, each containing the name of the head of each emigrant family, and the names of his wife, children, and servants who accompanied him on the voyage of the *Mayflower*, or who subsequently joined him at Plymouth in New England.

At the end of these entries comes this entry:—

"These being about 100 souls came over in this first ship, and began this work which God of His goodness hath hitherto blessed: let His holy Name have the praise, and seeing it hath pleased Him to give me to see 30 years completed since these beginnings, and that the great works of His Providence are to be observed, I have thought it not unworthy my paines to take a view of the decreasings, and the increasings of these persons, and such changes as has passed over them and theirs in this 30 years. It may be some use to such as come after. I will therefore take them in order as they lye." Then follow entries of the marriages, births, and deaths of the surviving families of the settlers, accompanied with notices relating to some of them.

The writer then proceeds: "Of these 100 persons which came first over, in this first ship—the greater part dyed in the general mortality; and most of them in 2 or 3 months time, and for those who survived, though some were ancient and past procreation, and others left the place and country, yet of those few remains are sprung up 160 persons in this 30 years, and are now living in this present year 1650, besides many of their children which are dead, and come not within this account. And of the oldest (stock of one or other) there are yet living this present year 1650 near 30 persons. Let the Lord have the praise, who is the High Preserver of them."

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The entry prefixed to the book by Major Bradford's grandson is as follows: "This Book was writ by my grandfather William Bradford, and given to his son Major Wm. Bradford, and by him to his son Major Jno. Bradford.

"Writ by me Saml. Bradford: Mar. 20, 1705."

Then follows the signature—"John Bradford."

There is an entry on the next page but one, March 20, by Samuel Bradford: "But Major Bradford tells me and assures me that he only lent this Book of his grandfather to Mr. Sewell, and it being of his grandfather's own handwriting he had so high a value for it, that he would never part with the property, but would lend it to me, and desired me to get it which I did, and write down this that so Major Bradford and his heirs may be known to be the right owners. Written when the Book came into my hands."

Then comes the following entry on the previous page:—

"This Book belongs to the New England Library.

"Begun to be collected by Thos. Prince upon his entering Harwood College, July 6, 1703, and was given by—

"It now belongs to the Bishop of London's library at Fulham."

The history of Major Bradford as bearing on the authenticity and legal authority of this register is, that he arrived at Plymouth in New England in the *Mayflower* in December, 1620; that in April, 1621, Carver, the Governer of Plymouth, died, and Bradford was elected to fill the vacancy in the governorship occasioned by Carver's death; that he resigned the governorship in 1633, was re-elected in 1635, and retained it until 1650, when he resigned it, and died on May 9, 1657, aged sixty-seven, and that during all this period his high official position as Governor up to 1650 was recognised from the entries in the manscript by the Sovereigns of this country.

These entries in the register, having been officially recorded by the highest officer of State in the Colony, are entitled to be admitted as evidence in courts of justice, in pedigree cases, of the facts therein recorded.

No record or evidence has been found as to how or at what

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date this manuscript book came into the custody of the Bishops of London.

From the entries in this book it is clear that Mr. Prince was anxious to secure permanent possession of it for the library he had established in Massachusetts, and that the Bradford family had determined to retain it in their possession. It must have been deposited at Fulham Palace after 1727 and before the Declaration of the Independence of the States of America. The most probable ground of its being placed there would be that up to the time of the Declaration of Independence New England was for ecclesiastical purposes in the diocese of London, and that it has been the practice to transmit from the Colonies and from foreign parts certificates of the marriages, births, and deaths of British subjects to the Bishop of London's registry for safe custody and reference in this country, the bishop's registry being the only public registry for the custody of such documents within the diocese; and from the circumstance of the whole manuscript, with the exception of the last five pages, being of historical interest, the register at this end of it might have been overlooked, and thus it was retained amongst the other historical documents connected with the North American Colonies in the episcopal registry at Fulham Palace simply as a historical manuscript.

On Mr. Bayard making application to the Bishop of London to allow this document to be transmitted to the President and Senate of the United States for custody, his Lordship, after inquiries as to the practice of the diocese in such cases, and more especially on ascertaining that the document contained an authentic register of marriages, births, and deaths which might be of importance as tracing descents and rights of succession to property, directed the manuscript to be deposited in the strong room of the registry of the Court, and referred the application to be dealt with by the Court.

The only reported case pertinent to the present application is in the matter of an application on the motion of Her Majesty's Government to the Prerogative Court of Canterbury in 1853 for the delivery of the original will and codicils of the Emperor Napoleon I., which had been proved in that Court on

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August 5, 1824, to Lord John Russell, Her Majesty's Principal Secretary of State for Foreign Affairs, for the purpose of being made over to the French Government, upon a notarial copy thereof being left in the registry of the Court. (1) The application was founded on an affidavit of Lord John Russell, deposing that it appeared to Her Majesty's Government that on grounds of public policy such application should be complied with.

The Queen's Advocate, Sir John Harding, referred to three cases in support of his application, stating that the question was simply one of discretion; that sufficient grounds had been set forth in the affidavit of the Secretary of State to justify the Court in making the decree; that no one's interest could be injured thereby; and that the surviving executors were consenting.

Sir John Dodson, in delivering judgment, said: "This is an application, at the instance of the Lords of the Treasury, to this Court to decree the will and several codicils of the late Napoleon Bonaparte to be delivered out of the registry to Her Majesty's Principal Secretary of State for Foreign Affairs, for the purpose of being given up to the French Government. The ground of the application is stated to be public policy, which the Queen's Advocate seemed to think was of itself almost sufficient to induce the Court to grant the prayer. I cannot, however, hold to that view; it is necessary to shew that the step proposed to be taken is conformable to law. Undoubtedly this Court, as all other Courts, is desirous to carry into effect the views of Her Majesty's Government; nevertheless, it must not venture to go beyond the limits of legal authority. In a country governed by settled laws, it is necessary for Courts to be guided by those laws, and not by the will and desire of a government. . . .

"In the present instance it was pointed out to me that, independently of the wishes of Her Majesty's Government, there is legal authority to justify me in complying with the application. Three cases have been produced from the records of this court. . . .

(1) *In the matter of The Will and Codicils of the late Emperor Napoleon Buonaparte, deceased*, 2 Robertson, 606.

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"The third case mentioned, which occurred in 1839, appears to furnish a more direct bearing. The case was this:—Sir Herbert Taylor made a codicil at Rome to his will, the papers were proved here, and that codicil was afterwards delivered out for the purpose of being sent to France, there to be placed in proper custody.

"On consideration, I think, I may be justified in following Sir Herbert Taylor's case, and granting the present application; but I cannot do so exactly in accordance with the precise form of the prayer, as I have not, I conceive, the power. I shall order the papers asked for to be delivered out, not for the purpose of their being sent to the French Government, but for the purpose of placing them in the custody of the legal authorities in France, to be recorded in the proper place; and I have no doubt that Lord John Russell will take care that this condition is complied with. I will direct the registrar, after notarial copies have been made, to attend on his Lordship, and deliver the original papers to him, for which he must give a receipt. I think I am justified in going thus far, as, in some respects, this case is stronger than Sir Herbert Taylor's. Sir Herbert was beyond doubt a domiciled Englishman; but Napoleon Bonaparte, though a prisoner at St. Helena, did not, I conceive, from that circumstance lose his French domicil; moreover, his property in this country was very small. Under all the circumstances of the case, I decree the original papers to be delivered out, in order that they may be sent, as in Taylor's case, to the legal authorities in France."

The Queen's Advocate intimated he could not pledge himself, inasmuch as he had no authority to accept the grant in any other form than that moved by him, that the exact terms specified by the Court would be observed by the Secretary of State. The Court stated that it must adhere to its decree, and could not presume that it would be disregarded.

The application in the present case differs from the one the Court has just referred to in the following particulars.

In that case the estate of the Emperor had long been distributed, and the testamentary papers in question were no longer of pecuniary interest to anyone, and the surviving

executors of his will were consenting parties to the application.

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In the present case the entries in the register may involve the pecuniary interest of descendants of families named in it in tracing and establishing their rights to succession to property, and it is therefore the duty of the Court in making any order for its removal to other custody to take especial care that such persons shall not be thereby prejudiced. It is also a matter for observation that at the time when the manuscript was transmitted to Fulham Palace the Bishop of London's registry in Doctors' Commons was a legitimate place for depositing registers or certificates of marriages, baptisms, and deaths of persons resident in the Colonies as well as of persons resident in the London diocese in England, and that as on the Declaration of Independence the diocesan registry ceased to be the registry for marriages, baptisms, and deaths in New England, the transmission of this register to the country to which it relates may be properly made in analogy to the practice in this country whereby when a new diocese is carved out of an old one a transfer of all documents in the registry of the old diocese relating to the new diocese is ordered to be made to the registry of the new diocese.

The Court will make a decree for the transmission of this manuscript book to the Governor of the Commonwealth of Massachusetts in the United States of America, subject to certain terms and conditions which I will settle in chambers. Had this manuscript been solely of historical value the Court would have had no hesitation in acting upon the precedent of the Library Company of Philadelphia referred to by Mr. Statham, who so liberally restored to this country certain correspondence of national interest which was deposited in that library.

The terms and conditions referred to in the above judgment as those subject to which the Court decreed the manuscript book there mentioned to be transmitted to the Governor of the Commonwealth of Massachusetts, were subsequently settled

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by the direction of the Chancellor, and are specified in the following extract from the minute of the decree :—

"And . . . . the judge being of opinion that the said manuscript book had been upon the evidence before the Court presumedly deposited at Fulham Palace some time between the year 1729 and the year 1776, during which time the said Colony was by custom within the diocese of London for purposes ecclesiastical, and the registry of the said Consistory Court was a legitimate registry for the custody of registers of marriages, births, and deaths within the said Colony, and that the registry at Fulham Palace was a registry for historical and other documents connected with the Colonies and possessions of Great Britain beyond the seas so long as the same remained by custom within the diocese of London, and that on the Declaration of the Independence of the United States of America in 1776 the said Colony had ceased to be within the diocese of London, and the registry of the Court had ceased to be a public registry for the said Colony (1), and having maturely deliberated on the cases, precedents and practice of the Ecclesiastical Courts bearing on the application before him, and the special circumstances of the case, decreed as follows : (i.) That a photographic facsimile reproduction of the said manuscript book verified by affidavit as being a true and correct photographic reproduction of the said manuscript book be deposited in the registry of our said Court by or on behalf of the petitioner before the delivery to the petitioner of the said original manuscript as hereinafter ordered. (ii.) That the said manuscript book be delivered over to the said Hon. T. F. Bayard by the Lord Bishop of London, or in his Lordship's absence by the registrar of the Court, on his giving his undertaking in writing that he will with all due care and diligence on his arrival from England in the United States convey and deliver in person the said manuscript book to the Governor of the Commonwealth of Massachusetts in the United States of America, at his official office in the State House in the city of Boston, and that from the time of the delivery of the said book to him by the said Lord Bishop of London, or by the said registrar, until he shall have delivered the same to the Governor of Massachusetts he will retain the same in his own personal custody. (iii.) That the said book be deposited by the petitioner with the Governor of Massachusetts for the purpose of the same being with all convenient speed finally deposited either in the State archives of the Commonwealth of Massachusetts in the city of Boston, or in the library of the Historical Society of the said Commonwealth in the city of Boston, as the Governor shall determine. (iv.) That the Governor of the said Commonwealth for all time to come be officially responsible for the safe custody of the said manuscript book, whether the same be deposited in the State archives in Boston or in the Historical Library in Boston, as well as for the performance of the following conditions, subject to a compliance wherewith the said manuscript book is hereby decreed to be deposited in the custody of the aforesaid Governor of the Commonwealth of Massachusetts and his successors, to wit : (*a*) That all persons have such access to such manuscript book as to the Governor of the said Commonwealth for the time being shall appear to be

(1) The Colony of New England.

reasonable, and with such safeguards as he shall order. (*b*) That all persons desirous of searching the said manuscript book for the bonâ fide purpose of establishing or tracing a pedigree through persons named in the last five pages thereof, or in any other part thereof, shall be permitted to search the same under such safeguards as the Governor for the time being shall determine on payment of a fee to be fixed by the Governor. (*c*) That any persons applying to the official having the immediate custody of the said manuscript book for a certified copy of any entry contained in proof of marriage, birth, or death of persons named therein, or of any other matter of like purport for the purpose of tracing descents, shall be furnished with such certificate on the payment of a sum not exceeding one dollar. (*d*) That with all convenient speed after the delivery of the said manuscript book to the Governor of the Commonwealth of Massachusetts, the Governor shall transmit to the registrar of this Court a certificate of the delivery of the same to him by the petitioner, and that he accepts the custody of the same subject to these terms and conditions." (1)

On April 29 last "The Log of the *Mayflower*" was handed over by the Lord Bishop of London to the Hon. T. F. Bayard, who had at that date ceased to be the ambassador of the United States of America at the Court of St. James's, on his giving the undertaking in writing required of him under the terms of the above decree; and Dr. Tristram, on this occasion, in consequence of an informal application having been made to him that the manuscript should not be handed over to Mr. Bayard pursuant to the above-mentioned decree, delivered the following judgment:—

DR. TRISTRAM. On Saturday, April 10, an application was made to me in the presence of the Lord Bishop of London and of the registrar of the Court by Mr. Henry White, secretary to the American Embassy, on the instructions of the Hon. Colonel Hay, the present American Ambassador, for the manuscript known as "The Log of the *Mayflower*" to be delivered over to Colonel Hay on his arrival in England, or to himself in the meantime, instead of to Mr. Bayard, on the ground that Mr. Bayard on his return from the Continent to England, when the delivery was to be made to him, would have ceased to be ambassador here. He stated that, if his application was granted, the manuscript would be transmitted with other

(1) A confirmation of this decree exemplifying the same under the seal of the Consistory Court of London was issued from the registry on April 12, 1897.

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State papers to the President of the United States with a view to its transmission by the President to the Governor of Massachusetts, to be deposited by him either in the State archives or with the Historical Society in the City of Boston, in compliance with the order of the Court. It appeared to me that the application was a reasonable one; but I pointed out to Mr. White that, preliminary to my granting it, if it were in my power to do so, it would be necessary for a formal application to be made to me by him in open court for leave to move to vary the decree in the manner suggested, and that if I acceded to such an application and amended the decree it would be competent to any person alleging an interest in the matter to appeal from the amended decree to the Court of Arches, and from thence to the Judicial Committee of the Privy Council; whereas the time for appealing from the original decree, if it remained unaltered, viz., fifteen days from the date of its being made, had expired on the previous day. Mr. White thereupon said he would leave his application to be dealt with by me as I might deem right. I considered, however, that the application having been made on the instructions of an ambassador at the Court of St. James's, it was only due to his Excellency that I should maturely consider the question, and state on the present occasion whether it was or was not within powers discretionary or otherwise vested in the Court competent to it to make such a variation in the decree. I have now come to the conclusion that it would not be in accordance with the practice of the Court or just to the parties interested in the manuscript that I should so vary the original decree.

In my judgment of the 25th of last month I stated, that as the entries in the register at the end of the manuscript "might involve the pecuniary interests of descendants of families named in it in tracing and establishing their rights to succession to property, it is therefore the duty of the Court in making any order for its removal to other custody to take especial care that such persons shall not be thereby prejudiced." For my assistance in giving directions in the registry as to the terms in which the decree of the Court should be framed, I obtained from the principal Probate Registry a copy of the

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order made by the Prerogative Court of Canterbury for the delivery up of the will and codicils of the Emperor Napoleon I., as being the precedent on which I relied in granting the application in the present case. The order is dated February 17, 1853, and is in the following terms :—

"F. H. Dyke, Her Majesty's Procurator-General, exhibited affidavit of the Right Hon. John Russell, commonly called Lord John Russell, and also affidavit of John Allen Powell, Esq., and brought in proxy of consent with act of Court sped thereon and also statement in writing. The judge having read the said affidavits and statement at petition of Dyke, and on motion of Her Majesty's Advocate, directed the original will and codicils of the said deceased, now remaining in the registry of this Court, to be delivered into the possession of Her Majesty's Secretary of State for Foreign Affairs by one of the deputy registrars of this Court for the purpose of being recorded or filed in the proper Court, or with the legal authorities in France, on a notarial copy of the said will and codicils being left in the registry of this Court, and assigned Dyke to bring in a certificate of the said original will and codicils being recorded or filed as aforesaid."

It is of importance for the purpose of preserving to persons interested in the entries in the register at the end of the manuscript the same rights as they would have had if the manuscript had remained under the control of the Court, that the decree of the Court should be so framed as to entitle them to enforce compliance with its provisions in the courts of the United States after its transfer to that country.

According to the law on this point, as stated by Story J. in his great work on the Conflict of Laws, and the American cases cited by him, it seems that compliance with the provisions of the decree in this case would be enforced in the courts of the United States: "In order however to found a proper ground of recognition of any foreign judgment in another country," says Judge Story, "it is indispensable to establish that the Court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties." (1)

(1) Story, Conflict of Laws, s. 586.

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As to proceedings in rem against moveable property within the jurisdiction of the Court pronouncing the judgment, the same learned writer observes: "Whatever the Court settles as to the right or title" or as to its disposition by transfer or other act, "will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal." (1) In the present case the manuscript or moveable property is within the jurisdiction of the Court and subject to its decrees. Mr. Bayard is also within its jurisdiction, and will now undertake, not as ambassador, but as an individual, to act as the delegate of the Court in this matter in the place of the registrar, who primarily would be the proper official to convey the manuscript to the Governor of the Commonwealth of Massachusetts.

Mr. White's proposal was that the Court should order the manuscript to be delivered to Colonel Hay, as ambassador, to be forwarded by him with the State papers to the President of the United States, in order that it might be transmitted by the President to the Governor of the Commonwealth for the purposes named in the decree. The objection to so varying the decree is that the Court has no power to make an order on the head of a Sovereign State to carry out any of the provisions of its decrees, and that such an order, if made, would not be enforceable against the President, as far as my researches have gone, in the courts of the United States, at the instance of an aggrieved party. Under these circumstances my duty will be to adhere to the decree in the terms in which it was expressed, and which are substantially in the terms of the prayer of the petition, and in conformity with the order of the Prerogative Court of Canterbury made in the matter of the will and codicils of the Emperor Napoleon I.

Solicitors for petitioner: *Lee, Bolton & Lee.*

(1) Story, Conflict of Laws, s. 592.

C. F. J.

In the Goods of CHILCOTT.

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May 3, 6.

Probate—Will—Revocation—Revival—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 22.

A testatrix in 1889 made a will, and in 1892 instructed her solicitor to prepare a codicil, which she took away with her, but never executed. Later in 1892 she executed a fresh will, prepared by a different solicitor, revoking the former will. In 1893 she executed a codicil, prepared by her original solicitor, who was in ignorance of the existence of the second will, and believed that the codicil to the first will had been duly executed; this codicil purported to be a second codicil to the will of 1889, and to confirm "my said will and the first codicil thereto":—

Held, that the codicil, by its language, revived the earlier will, and that both the wills, together with the codicil, must be admitted to probate.

Motion on behalf of the executors of Eliza Chilcott for a grant of probate of a will and codicil of the deceased bearing date May 14, 1892, and September 7, 1893, respectively.

Eliza Chilcott, who died on January 16, 1897, made a will on July 16, 1889, by which she disposed of her property and appointed T. B. Mitchell and F. W. Spear her executors. In the year 1892 she instructed a solicitor, named Shield, who had prepared her will, to prepare a codicil to it; this was done, and the draft codicil was taken away by the testatrix, but was never executed by her. Later in 1892 she gave instructions to another solicitor to prepare a fresh will for her, and on May 14, 1892, a will was duly executed by her by which she revoked the will of 1889 and disposed of her property, appointing the same executors. In 1893 she gave instructions to Shield to prepare a codicil, and he, in ignorance of the existence of the will of 1892 and believing the codicil of 1892 to have been executed, drafted a codicil which purported to be a second codicil to the will of 1889 and to confirm that will; the codicil was duly executed on September 7, 1893. The material parts of this codicil are as follows: "This is a second codicil to the will of Eliza Chilcott, which bears date July 16, 1889. . . . . In all other respects I confirm my said will and the first codicil thereto." Application was now made on behalf of the executors for a grant of probate of the will of May 14, 1892, with the

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codicil of September 7, 1893, omitting the will of July 16, 1889; the surviving residuary legatee under the will of 1889 consented to the application.

Barnard, for the executors. The codicil of 1893 does not revive the will of 1889, which was revoked by the will of 1892, and that document should not be included in the probate. By s. 22 of the Wills Act, 1837, no will that has been revoked can be revived except by re-execution or by a duly executed codicil shewing an intention to revive it; here the codicil of 1893, if construed with regard to the circumstances, shews no such intention. A codicil which merely refers to a will by its date, and confirms it, does not indicate an intention to revive it: *In the Goods of Steele.* (1) The use of the expression "I confirm my said will" does not carry it further than saying "This is a codicil to my said will." In *In the Goods of Stedham* (2), where the first will was held to be entitled to probate, the codicil seems to have done more than refer to the first will by date, for it appears from the judgment that the solicitor, in preparing it, employed the terms and language of that will. The decision in *In the Goods of Steele* (1) is expressly in point, and governs the present case. [He also cited *In the Goods of Ince* (3); *In the Goods of Dyke.* (4)]

Cur. adv. vult.

May 6. GORELL BARNES J. The question to be decided in this case is what documents should be admitted to probate, and it arises under the following circumstances. The testatrix, Eliza Chilcott, of Bristol, made a will on July 16, 1889, by which she disposed of her property, and appointed T. B. Mitchell and F. W. Spear her executors. On May 14, 1892, she made another will, which also disposed of her property, and in which she appointed the same executors. She had desired to make a codicil, and had given instructions to that effect to her solicitor, who had prepared a codicil and sent it to her for execution; then, without her solicitor's knowledge and with the assistance

(1) (1868) L. R. 1 P. & M. 575.
(2) (1881) 6 P. D. 205.
(3) (1877) 2 P. D. 111.
(4) (1881) 6 P. D. 207.

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of another person, she had executed the second will, and not the codicil which her solicitor supposed she had executed; that codicil was in fact never executed at all. Subsequently she executed the codicil of September 7, 1893. When she wished to do that, she went to the solicitor who had prepared the will of 1889, and he, in ignorance of the existence of the will of 1892, and believing that the testatrix had executed the codicil which he had prepared for her, prepared a codicil for her. It contained these words: "This is a second codicil to the will of Eliza Chilcott, which bears date July 16, 1889. . . . In all other respects I confirm my said will and the first codicil thereto." This codicil was duly executed. The present application is for probate of the will of 1892 and the codicil of 1893 without the will of 1889. The point taken by the learned counsel is that the testatrix in signing the codicil of 1893 made a mistake owing to the fact that her solicitor was not informed of the true state of the facts, and that she really desired to confirm the will of 1892. The difficulty in the way of acceding to this application lies in the express language of the codicil. In distinct terms it refers to the will of 1889, and it expressly confirms that will and what the solicitor supposed to be the first codicil. There is no doubt that in drawing the codicil of 1893 the solicitor meant to deal with the will of 1889 and the codicil to it which he believed to have been executed. In my opinion this case comes within the authority of *In the Goods of Stedham* (1) and *In the Goods of Dyke* (2), where the point was very similar, and not within *In re Steele.* (3) In his judgment in *In the Goods of Stedham* (1) Sir James Hannen says: "The solicitor who was instructed to prepare this codicil, instead of making a codicil to the will of 1878, made a codicil to the will of May 21, 1877, and I was asked to treat it as a mere mistake as to the date, and to allow probate of the codicil together with the last will of February, 1878. I am unable to do so, for this reason: that it was not a mere mistake as to the date of the will to which it was intended to append the codicil, but the mind of the solicitor, which must be treated as that of the testator,

(1) 6 P. D. 205. (2) 6 P. D. 207.

(3) L. R. 1 P. & M. 575.

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was actually applied to the provisions of the will of 1877." In the present case there can be no doubt that the solicitor, who only knew of the existence of the first will, and supposed that the intended codicil to it had in fact been executed, applied his mind to the first will, and then drew the codicil of September 7, 1893, which was duly executed. The result does not express, I am aware, the real intention of the testatrix; but I can only deal with the documents as they stand. I think, therefore, that all three documents, namely, the wills of 1889 and 1892 and the codicil of 1893, must be admitted to probate, their meaning being left to a court of construction, if necessary, to determine.

Solicitors: *Meredith, Roberts & Mills.*

W. J. B.

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March 29, 30; *May* 6.

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Admiralty — Action in rem — Necessaries — Bunker Coal—Master's Lien— Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 167—*Change of Ownership—Liability of res—Settlement of Action.*

The defendants, owners of a steamship, transferred the possession of it to a Glasgow firm subject to conditions in a contract of sale, by which the defendants were to remain registered owners, and in effect to become mortgagees until payment of the purchase-money. The Glasgow firm appointed the plaintiff master, and he, whilst on a voyage to the River Plate on account of that firm, and not having notice of the contract of sale, drew two bills of exchange on the Glasgow firm for bunker coal supplied to the vessel at the time the bills were drawn, but in pursuance of a coaling contract previously made in this country between the Glasgow firm and the coal merchants. The bills were dishonoured at maturity, and, the Glasgow firm having suspended payment, the defendants, as unpaid vendors, retook possession of the vessel. They then settled with the plaintiff an action in rem brought, in the name of the plaintiff, by the coal merchants, under an irrevocable mandate, executed by the plaintiff, authorizing them to exercise, in his name, the right of lien, which he claimed under s. 167 of the Merchant Shipping Act, 1894, against the vessel in respect of his liability as drawer of the two bills of which the coal merchants were the holders:—

Held, by Gorell Barnes J., that the settlement of the action was void as against the coal merchants to whom the plaintiff was liable on the bills, and this liability having been incurred by the plaintiff as master in the

ordinary course of his employment on account of the ship, within the meaning of the statute, he had a valid maritime lien, which could be enforced against the vessel, though the coals were supplied on the credit of the Glasgow firm, and not of the defendants, whose property the ship was.

ACTION IN REM for wages and disbursements.

The plaintiff was the master of the steamship *Ripon City*; the defendants were the owners of that vessel.

The following statement of the material facts is taken from the judgment:—

In October, 1895, Messrs. Furness, Withy & Co., Limited, of Hartlepool, the managing owners of the steamship *Ripon City*, and owners of nearly all the shares in her, contracted provisionally to sell that vessel to Messrs. Neil, M'Lean & Co., of Glasgow, for the sum of 8000*l.*, upon certain terms as to payment by instalments and security therefor. The vessel was to be taken over, on completion of her then present voyage, at Antwerp. In November, 1895, the contract was definitely agreed to, and modified so that the vendors were to remain registered owners until they were in a position to transfer the whole of the shares (eight-sixty-fourths being held in the names of other owners), and upon such transfer they were to take a mortgage on the entire steamer to secure due payment of the instalments of the price. The vessel was accordingly taken over by Neil, M'Lean & Co. in October, 1895, and worked by them afterwards, and in October, 1896, eight-sixty-fourth shares were transferred to their senior partner, and 1000*l.*, part of the purchase-money, paid. He mortgaged these shares to other persons. No more shares were transferred to Neil, M'Lean & Co., or payments made by them, and they afterwards, on or about February 2, 1897, suspended payment, and Furness, Withy & Co. retook possession of the vessel.

In October, 1895, Neil, M'Lean & Co. appointed Captain Cormack, the plaintiff, as master of the *Ripon City*, and he took command of her at Antwerp and sailed her to the River Plate on their account. The ship's articles, dated October 17, 1895, were signed by the plaintiff, and described Neil, M'Lean & Co. as the registered managing owners. On October 4, 1895,

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Neil, M'Lean & Co. entered into a contract with Cory Bros. & Co., Limited, of London, for the supply of all coals required by the former from January 1 to December 31, 1896, at certain ports, including Buenos Ayres and La Plata, for the use of their steamers at certain specified rates, and the contract contained a provision for a reduction in case the general market price should fall below the agreed prices, and a clause in these terms: "Payment for coals and other necessaries supplied to be by honour of captain's draft on the managing owners at thirty days' sight, payable in London, and Cory Bros. & Co., Limited, shall be entitled to cancel this contract on failure of such honour." Neil, M'Lean & Co. had other coaling contracts for 1896, and they furnished the plaintiff with a memorandum headed "Coaling Contracts for 1896," containing a list of the ports for which they had contracts, the contract prices, and the names of the firms who were to supply the coals.

In May, 1896, the *Ripon City* was at Buenos Ayres, and was supplied by Cory Brothers with 268 tons of coal under the coaling contract, for the price of which, namely, 333*l.* 6*s.*, the plaintiff drew a bill of exchange, dated May 20, 1896, on Neil, M'Lean & Co., in favour of Cory Brothers, at fifty days' sight. In August, 1896, the vessel was at La Plata, and was supplied by Cory Brothers with 721 tons of coal under the contract, for the price of which, namely, 896*l.* 4*s.* 6*d.*, and 14*l.* 4*s.* cash advanced to the plaintiff, he drew a bill of exchange for 910*l.* 8*s.* 6*d.*, dated August 10, 1896, on Neil, M'Lean & Co., in favour of Cory Brothers at thirty days' sight. The bills of exchange were accepted by Neil, M'Lean & Co., and were duly presented for payment, but were dishonoured, and were accordingly protested for non-payment. Notice of dishonour was duly given to the plaintiff.

The coals were properly supplied for the necessary purposes of the vessel in order to enable her to perform the services on which she was engaged, and the small advance was necessarily and properly made for the purposes of the ship. The plaintiff also drew two other small bills on Neil, M'Lean & Co. for coals supplied to the vessel by other persons at the Orkneys and Copenhagen, which have not been paid, and he had in

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February, 1897, a claim for balance of wages amounting to 83*l.* 0*s.* 3*d.* After the suspension of Neil, M'Lean & Co. the plaintiff arrested the *Ripon City* in Scotland in respect of the wages and coals, and afterwards, on February 13, 1897, he signed a memorandum of mandate authorizing Cory Brothers to exercise in his name, or their own, his right of lien against the *Ripon City*, in respect of the two bills, of which they were the holders, for 333*l.* 6*s.* and 910*l.* 8*s.* 6*d.*, and on their recovering any money in virtue of any proceedings taken by them in his name, or their own, against the *Ripon City*, he thereby authorized them to apply the proceeds in extinction pro tanto of the amount of his indebtedness to them on the two bills, and declared the mandate irrevocable. The proceedings in Scotland do not seem to have been continued, and Cory Brothers appear to have arranged with the plaintiff that their solicitors should act in the matter. On February 17, 1897, their solicitors accordingly issued a writ in rem in this Division in the name of the plaintiff —but really for the benefit of Messrs. Cory so far as concerns the amount of the two bills held by that firm—against the owners of the vessel for the sum of 1900*l.*, and bail in that amount was given by the defendants. In the statement of claim in the action a claim was made not only in respect of the amount due to Cory Brothers, but also for the amount of the plaintiff's liability in respect of the coals supplied at the Orkneys and Copenhagen and his wages. In their defence, delivered on March 22, 1897, the defendants, whilst denying liability, paid into court the amount of the claim for wages, 83*l.* 0*s.* 3*d.*, and after stating the facts as to the ownership of the vessel, pleaded in effect that Neil, M'Lean & Co. were alone liable, and that the plaintiff's part in the transactions relating to the bills "was merely colourable, and done for the purpose of attempting to give the said suppliers of the coals (for whose benefit this action is brought) a lien on the said vessel to the prejudice of the defendants," and that the plaintiff was not liable on the bills.

The action was set down for trial on March 27, and Furness, Withy & Co., knowing that the action was really the action of Cory Brothers, endeavoured to see the plaintiff, but being told

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that he could be found at the solicitor's office they appear to have determined to communicate direct with him, and, after setting a watch for him, they ultimately traced him, and on March 24, in order to defeat the claim of Cory Brothers, arranged with the plaintiff a settlement of the action without the cognizance of the solicitors for Cory Brothers, or their own solicitors. The settlement was effected by Mr. Stoker, a director of Furness, Withy & Co., assisted by Mr. Hull, a clerk, and Mr. Donald, an agent of the firm. The plaintiff was paid 400*l.*, and a receipt was taken from him for that sum in full settlement of his claims against them and in the action of *Cormack* v. *The Steamship Ripon City*, and he agreed to all proceedings in the said action being forthwith stayed, each party to pay their own costs of the action. A summons was then taken out before Gorell Barnes J. to stay the action, but the learned judge adjourned the summons to the hearing, and the case was accordingly heard on March 29 and 30.

Sir Walter Phillimore, *C. F. Gill*, and *F. Laing*, for the plaintiff.

Joseph Walton, *Q.C.*, and *Dawson Miller* (*Balloch* with them), for the defendants.

The arguments of counsel fully appear from the judgment.

Cur. adv. vult.

May 6. GORELL BARNES J. This case raises questions of very considerable importance to owners and masters of ships, especially steamships, and to merchants engaged in the business of supplying vessels with necessaries. [The learned judge then dealt with the facts already set out, and continued:—]

Three points were taken by counsel for the defendants: first, that the plaintiff was not liable on the bills; secondly, that even if he were liable, he had no maritime lien on the vessel for the amount of the bills; thirdly, that the settlement having been effected with the plaintiff on the record was an answer to the action.

The argument on the first point for the defendants was that

the coals were not ordered by the plaintiff, but were supplied under the coaling contract; that he merely put his name to the bills for the convenience of the suppliers of the coal, and received no consideration for drawing the bills.

I believe that formerly, more than now, masters of steamers in foreign ports themselves contracted at such ports for the supply of the coals they required and drew on their owners for the price, and do so still in certain cases; but at the present day many owners of steamers who have not coal supplies of their own in foreign ports are in the habit of entering into forward contracts with large coal suppliers who have depots or agents at such ports for the supply of coal to any of their steamers which may visit those ports. The coal suppliers do not themselves draw on the owners for the price of the coal supplied, but, after supplying the quantity of coals required by the master, take his draft in their favour upon the owners. In this way they not only have the personal liability of the master on the bill, but by putting pressure upon him can practically force him to proceed against the vessel for their benefit, and, as I understand, this is regarded as a valuable security by the coal suppliers. They have no right of process themselves against a British steamship for coals supplied to her where any part-owner is (as in this case) domiciled in England or Wales. Although, therefore, the master does not himself make the coal contract, he intervenes in it, fixes the quantity required, gives his order for that quantity, and then draws on his owners in favour of the suppliers for the price. He does not do so merely at the request and for the accommodation of the suppliers, but becomes a party to the bill in order to carry out his owners' bargain and because he cannot obtain the coals without doing so. His signature is part of the consideration for the supply of the coals, and he accepts that position by carrying out the transaction in accordance with a course of business well known to him. This was the manner in which the parties concerned dealt with each other in this case, and in my opinion the plaintiff became liable to Cory Brothers & Co., Limited, on the bills.

I have examined the proceedings in the case of *The*

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Castlegate (1), and will refer presently to that case. I find that the master, charterers, and coal suppliers acted in a similar manner to that adopted in the present case, and the master was sued by the suppliers of the coals in an action which was tried in London before Day J. and a special jury, and he was held liable on the bills drawn by him for the price of the coals. See also *Scott* v. *Lifford.* (2)

The argument on the second point for the defendants was that the master was not acting in his capacity as master in drawing the bills, that the case falls within the decision of *The Orienta* (3), and that, as the coals were supplied on the credit of Neil, M'Lean & Co., and not of Furness, Withy & Co., he could not proceed to enforce a lien against the property of the latter. Dealing with the two earlier arguments first, I am of opinion that in carrying out the transactions in question the master was acting within his ordinary capacity as master of the vessel, although Neil, M'Lean & Co. had arranged the price and terms of supply of the coals. The contract required him to go to a particular firm for his coals, and fixed the prices and terms, but he intervened to put it in operation by fixing the quantity required, giving the necessary orders therefor, and drawing for the price at the rate fixed. If there had been a decline in the general market price he would have had to arrange for the lower price. He carried out the transactions in his capacity as master at the request of his employers, and his liabilities incurred in doing so are, in my opinion (and subject to the next point to be considered), liabilities incurred by him on account of the ship for which a maritime lien is conferred by s. 167 of the Merchant Shipping Act, 1894 (4), which is a repetition of s. 1 of the Merchant Shipping

(1) [1893] A. C. 38.

(2) (1808) 1 Camp. 246.

(3) [1894] P. 271; [1895] P. 49.

(4) 57 & 58 Vict. c. 60, s. 167: "(1.) The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom.

"(2.) The master of a ship . . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages."

Act, 1889. A contrary decision would involve immense hardship to masters of steamships, as it might deprive them of the security of the vessel to discharge liabilities which they have incurred in following a course of business which has become prevalent owing to the exigencies of modern commerce. The case is distinguishable from that of *The Orienta*. (1) In that case the master had nothing whatever to do with the order for or supply of the coals. Apparently after they had been supplied to the steamer in London, a home port, and were alongside of her, he voluntarily signed a draft at the request of his owners in favour of the suppliers for the price. The contract had a clause as to the master giving a draft somewhat similar to that in the present case. The President, in giving judgment, said that it was stated on behalf of the suppliers of the coals that their object in stipulating for payment by the master's draft was to entitle themselves to a maritime lien by virtue of s. 1 of the Merchant Shipping Act, 1889 (the Act then in force), and that there could be no doubt that the owners intended to confer such lien if they could, and the master gave the bill by arrangement with his owners for that purpose, and the President held that the master, in lending his name at the request of the owner, was not, in the circumstances, acting within the ordinary course of his employment as master, and he gave judgment in favour of certain mortgagees who had intervened in the suit, giving the plaintiff leave to move for such judgment as he might be advised against the owners of the vessel. This decision was affirmed in the Court of Appeal. I may observe that it was not argued in that case that the master was not liable on the bill, possibly because he seems from the report to have drawn it at the request of his owners; though a point might perhaps have been made that in the peculiar facts of the case it might be inferred that he drew it as much at the request of the coal suppliers as of his owners for their joint accommodation.

The distinction between that case and the present is broad. In the former the master did not properly incur liabilities on account of the ship in the ordinary course of his employment,

(1) [1894] P. 271; [1895] P. 49.

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whereas in the present case he obtained the coals in the ordinary course of his employment as master of the vessel, and by so doing pledged the credit of Neil, M'Lean & Co. for them, and rendered himself liable on the bills drawn by him. Without doing so, he could not have obtained the coals which were necessary for the purpose of the navigation of the vessel on the service on which she was engaged. So that he did incur liabilities properly on account of the ship within the meaning of the 167th section of the Act of 1894, and, subject to the question raised by the last point taken in argument, in my opinion he obtained a maritime lien upon the vessel.

The last and most difficult question raised by the second point has to be considered, namely, whether the master acquired a maritime lien which can be enforced by him against a vessel legally owned by the defendants, and not by Neil, M'Lean & Co. The proposition maintained by counsel for the defendants was that a maritime lien can only arise and be enforced against a vessel owned by persons who are personally liable to the party seeking to enforce the lien. For this proposition only the cases of *The Parlement Belge* (1), *The Castlegate* (2), and *The Utopia* (3) were cited. But there are a number of other cases which it is necessary to examine in order to arrive at a conclusion on the matter, and it will be convenient to deal with the cases in order of date. In *The Druid* (4) Dr. Lushington dismissed a cause of damage on the ground that the damage was wilfully committed by the master, and the owners were not responsible for it. A passage in his judgment has been supposed to support the proposition in question, but that passage has been explained by Sir Robert Phillimore in *The Lemington* (5), and by Lord Hannen in *The Tasmania*. (6) *The Orient* (7) was a case where an agent for sale of a ship without any authority from her owners, and with the intention of asserting his own rights to certain foreshore, moored her so as to cause damage to another ship, and a suit against the ship was dis-

(1) (1880) 5 P. D. 197.
(2) [1893] A. C. 38.
(3) [1893] A. C. 492.
(4) (1842) 1 Wm. Rob. 391.
(5) (1874) 2 Asp. M. L. C. 475.
(6) (1888) 13 P. D. 110, at p. 116.
(7) (1871) L. R. 3 P. C. 696.

missed. The damage was done in the first of these cases by a servant, and in the second by an agent, acting, not only without authority, but unlawfully. *The Ida* (1) appears to have been decided on similar grounds. In *The Ticonderoga* (2) Dr. Lushington held that a vessel under the exclusive control of certain charterers might be proceeded against in rem for damage to another vessel by collision occasioned by the default of the charterers' servants. He says: "We must recollect that this is a proceeding in rem. I am not aware, where there has been any proceeding in rem, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage and was proceeded against in this court;—I will admit, for the purpose of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point;—but, still, I should here say to the parties who had received the damage that they had, by the maritime law of nations, a remedy against the ship itself. Let us see what cases there are in which the Court does not hold a vessel responsible for the damage done. There is one case, and one only, that I am aware of, and that is where a pilot is taken on board by compulsion. On what principle is the owner, in that case, relieved from paying the damage done? On the principle of compulsion—the principle that the man is not the servant of the owner, but is forced upon him by Act of Parliament." In *The Ruby Queen* (3) the same judge—in a case where a yacht of the defendant was intrusted for reward to yachting agents for sale, and by their servants moored in the winter season without striking her top gear, whereby on a gale occurring the yacht drifted and fouled another yacht—held that

(1) (1860) Lush. 6. (2) (1857) Sw. 215.
(3) (1861) Lush. 266.

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the yacht was liable in a proceeding in rem in the Court of Admiralty. In *The Edwin* (1) the same learned judge held that the fact that a master who was employed by one who had fraudulently obtained possession of a vessel will not prevent the master having a lien on the ship for his wages and disbursements if he has discharged his duties in ignorance of the fraud. The facts are only set out in pleadings, and the answer was struck out on motion so far as it related to the alleged fraudulent possession. The case would seem to come within the class of cases in which the owners have given up possession to some one else, though it was alleged that they were induced to do so by fraud.

The Lemington (2) was a similar case to *The Ticonderoga*. (3) Sir Robert Phillimore referred to the passage I have quoted from *The Ticonderoga* (3), and said: "Vessels suffering damage from a chartered vessel are entitled primâ facie to a maritime lien upon that ship, and look to the res as security for restitution. I cannot see how the owners of the res can take away that security by having temporarily transferred the possession to third parties." In *The Parlement Belge* (4) it was held that an unarmed packet belonging to the Sovereign of a foreign State, and in the hands of officers commissioned by him and employed in carrying mails, is not liable to be seized in rem to recover redress for a collision, and that this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire. The decision was that the Courts cannot exercise jurisdiction over the person of any Sovereign or over the public property of any State which is destined to its public use, though such Sovereign or property is within this country. A passage from the judgment of the Master of the Rolls was relied on in the argument before me. It is as follows: "In a claim made in respect of a collision the property is not treated as the delinquent per se. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not

(1) (1864) Br. & L. 281.
(2) 2 Asp. M. L. C. 475.
(3) Sw. 215.
(4) 5 P. D. 197.

the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to shew that the liability to compensate must be fixed not merely on the property, but also on the owner through the property." (1) This passage occurs in a part of the judgment in which Lord Esher was dealing generally with an action in rem the liabilities of owners and of an innocent purchaser who takes the property subject to maritime liens which attached to it as against him who was the owner at the time the lien attached, but the meaning of this passage, so far as concerns the present case, depends on the sense in which the term "owner" is used. It may, as Sir R. Phillimore points out in *The Lemington* (2), include persons who are placed in control of a vessel and hold her pro hac vice as owners. So read, there is nothing in it to affect the decisions in *The Ticonderoga* (3) and *The Lemington.* (2) In *The Tasmania* (4) a tug, while towing the plaintiffs' vessel, came into collision with and sank her. The tug was chartered by a company to work with their own tugs, and they appointed the captain. It was held that an action in rem would not lie against the tug, because the owners were not personally liable for the collision, and the charterers had exempted themselves from liability by the terms of the towing contract with the plaintiff. Lord Hannen, after reviewing the cases, said (5): "The result of the authorities cited appears to me to be this—that the maritime lien resulting from collision is not absolute. It is a primâ facie liability of the ship, which may be rebutted by shewing that the injury was done by the act of some one navigating the ship not deriving his authority from the owners; and that, by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners, so as to make the ship liable for the negligence of the charterers, who are, pro hac vice, owners. These propositions do not lead to the conclusion that where, as between the charterers and the person injured, the charterers are not liable, the ship remains liable nevertheless."

(1) 5 P. D. 197, at p. 218.
(2) 2 Asp. M. L. C. 475.
(3) Sw. 215.
(4) 13 P. D. 110.
(5) 13 P. D. 110, at p. 118.

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The case principally relied on by the defendants was *The Castlegate*. (1) There the owners of the *Castlegate* chartered her for six months to another firm, and by the charterparty it was agreed that the charterers should provide and pay for coals, and that the captain, though appointed by the owners, should be under the orders and directions of the charterers as regards employment, agency, or other arrangements. The charterers had a contract with a firm of coaling contractors for the supply of coals at foreign ports to their vessels, which is set out in the appendix to the case in the House of Lords, and, so far as is material, was substantially similar to the coal contract in the present case. In the course of a voyage under the charter it became necessary to procure coals abroad to enable the vessel to prosecute her voyage and earn her freight. The master, who had notice of the terms of the charterparty, obtained coals under the coaling contract and drew on the charterers for the value. The bills having been dishonoured, the master was sued on them, and judgment was recovered against him in the action in London. He then instituted a cause of disbursements in the High Court of Admiralty in Ireland against the ship and freight, and it was held by the Court of Appeal in Ireland and the House of Lords that he was not entitled to a maritime lien on the ship or freight. Counsel for the defendants contended that the language used in the judgments in the House of Lords supports their contention, but the passages to which they referred must be read with regard to the facts dealt with, and my reading of the judgments is that they were not intended to cover such a case as that now presented for my decision. The point now raised was not before the House, and the real decision was the same as that in *The Turgot* (2), namely, that a master who with knowledge of a charterparty, under which the charterers are to provide and pay for coals, orders coals on their credit and draws on them for the value, and had, and knew that he had, no authority, express or implied, to pledge the owner's credit for the coals, has not a maritime lien for the amount of his liability on the bills drawn for the price of the coals. This appears plainly from the following passage in Lord Watson's judgment. He says: "I can find no reasons,

(1) [1893] A. C. 38. (2) (1886) 11 P. D. 21.

either of equity or of policy, for enabling the master of a vessel, who is not bound to incur a liability, to relieve himself, when he does choose to incur it, out of property of his owners, although they may derive no benefit from it, and by the terms of his employment he is debarred from incurring it on their personal account." It is thus apparent that the decision in *The Castlegate* (1) does not govern the present case.

The last case which I need refer to is *The Utopia*. (2) There a vessel was wrecked in Gibraltar Bay, and the port authorities took from the owners, and assumed the task of protecting other vessels from, the wreck and neglected that duty. It was held that the owners of a vessel colliding with the wreck could not proceed against the wreck for their damages. The cases of *The Castlegate* (1) and *The Parlement Belge* (3) are referred to in the judgment, but the ground of the decision appears to have been that the authorities had taken action within the apparent scope of their powers as port authority, and that the owners could not be made liable for their default. This decision does not, in my opinion, affect the present question.

Although at first sight it might appear difficult to reconcile these decisions and all that has been said on the important subject under discussion, I think it will appear that in reality there is little or no conflict in the cases, and that the decisions are in accordance with certain ascertainable principles.

That maritime liens arise in certain well-known classes of claims is now firmly established. Though none of the texts of the Roman law appear to confer, upon the classes who now possess it, what we call a maritime lien, yet the principles of maritime law in relation thereto have possibly been developed to a large extent from some of the rules of the civil law: see the learned judgment of Curtis J. in *The Young Mechanic*. (4) So far as I can trace the origin of the modern doctrines on the subject of maritime liens, it is not so difficult to follow this development in cases arising out of contractual relations between the parties, as it is in cases of injuries done by vessels. There

(1) [1893] A. C. 38.
(2) [1893] A. C. 492.
(3) 5 P. D. 197.
(4) (1855) 2 Curtis' Rep. Cases, Circuit Court U.S. 404.

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is much diversity of opinion as to the source from which the notion of a lien for the amount of damage done is derived. In his interesting and excellent work on the Common Law, O. W. Holmes J., of Boston, finds this source in the ancient law of deodand, and considers that it is only by supposing the ship to have been treated as if endowed with personality that the seemingly arbitrary peculiarities of the maritime law can be made intelligible (see pp. 25–27, edition of 1882). Mr. Marsden, in his work on Collisions at Sea, on the other hand, prefers the theory that the present law of maritime lien for damage has sprung from the Admiralty practice of arrest to compel appearance and security (see p. 76, 3rd ed. (1)). This practice was similar to that which appears to have prevailed on the Continent of Europe (ibid. p. 79), and may have been deduced from, or suggested by, Roman procedure. See Ortolan's Institutes of Justinian, 12th ed. 1883, vol. iii. p. 586, par. 2034. If the former view be correct, it would seem to be immaterial in a case of collision caused by the negligence of persons on board a vessel to inquire whether or not they were the servants of the owners or of persons in possession; but if the other theory is adopted the position is not quite the same.

The exhaustive judgment of the President, Sir Francis Jeune, in *The Dictator* (2) favours the latter view. He investigates the Admiralty rule on this subject, as it has been treated for the last two centuries. He states that the Admiralty Court did not in early times treat the action in rem as a specific and distinct form of action, and explains how the process of the Court was carried into effect by arrest of the person or any property of the defendant to compel him to appear and put in bail; how actions beginning with arrest of the person became obsolete in the last century, and arrest of property to enforce appearance and security became rare and obsolete; how, in later times, the arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property in order to

(1) See also Select Pleas in the Court of Admiralty, edited for the Selden Society by the same author, vol. i. p. lxxii.

(2) [1892] P. 304.

assert for the creditor a legal nexus over the proprietary interest of his debtor; and how, if the owners do not appear, the judgment should be limited to the res in the hands of the Court, but if they appear they are in the same position as if they had been brought before the Court by personal notice. In that case he allowed execution to issue against owners who had appeared in an action in rem to recover the amount by which a decree exceeded the amount of the bail in the case. Again, Lord Esher, in that part of his judgment in *The Parlement Belge* (1) from which the passage above quoted is taken, also expounds the nature of the process and how the owners are indirectly impleaded to answer the judgment of the Court.

Whatever may have been the origin and process of development of a maritime lien for damage, there is no doubt that the doctrine of such a lien is now established, and the right to enforce it is different from the ancient right of arrest to compel appearance and security in this, that it is confined to the property by means of which the damage is caused, and may be enforced against that property in the hands of an innocent purchaser. I believe that the earliest English authority which distinctly establishes this doctrine is *The Bold Buccleugh* (2), where it was held by the Privy Council that in cases of collision a maritime lien for damage arises and may be enforced against the vessel which was in fault, and that such lien travels with the vessel into whosesoever possession she may come, and when carried into effect by a proceeding in rem relates back to the period when it first attached. *The Bold Buccleugh* (2) was approved by the House of Lords in *Currie* v. *M'Knight* (3), where the learned Lords considered the judgment of the Judicial Committee satisfactory in its reasoning, and that it was not only consistent with the principles of general maritime law, but rested upon plain considerations of commercial expediency. (4)

The definition of a maritime lien as recognised by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to

(1) 5 P. D. 197, at pp. 218, 219.
(2) (1851) 7 Moo. P. C. 267.
(3) [1897] A. C. 97.
(4) See per Lord Watson, [1897] A. C. 97, at p. 106.

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it or injury caused by it, to be carried into effect by legal process. In the multitude of cases, both in former times and now, the dispute about a service rendered to, or damage done by, a ship arises between the claimant and the owners of the ship, so that it is not unnatural to speak in general terms of the liability of the res and of the owners as being convertible terms, and of the process against the res as being a means of enforcing rights against the owners; but, whatever may be the exact history of maritime liens, in *The Dictator* (1) and *The Parlement Belge* (2), and in dicta which may be found in some of the other cases above mentioned to the effect that a maritime lien cannot arise and be enforced against a ship where the owners are not personally liable, I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the res are personally liable in respect of the claim. It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the damage.

The result of my examination of these principles and authorities is as follows: The law now recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages disbursements and liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another —a jus in re alienâ. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the res always coexists with a right against the res.

(1) [1892] P. 304. (2) 5 P. D. 197.

The right against the res may be conferred on such terms or in such circumstances that a person acquiring that right obtains the security of the res alone, and no rights against the owner thereof personally. A simple illustration of this is the case of bottomry.

Some of the cases I have examined above shew that where the owners of a ship have vested the control of the vessel in charterers the latter are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers: *The Ticonderoga* (1) and *The Lemington*. (2) A similar position arises in a case like that of *The Ruby Queen* (3), where the yacht was intrusted to the agent. Again, a mortgagee of a vessel is the owner of an interest in the vessel, and if he leaves the mortgagor in possession his interest will become subjected to maritime liens arising in the course of the employment of the vessel, although he is not personally liable for the claims in respect of which the liens arise. In *The Mary Ann* (4) and *The Feronia* (5), decided at a time when the master was considered to have (as he now has by the statute of 1894) a lien for his disbursements and liabilities properly made or incurred on account of the ship, and before *The Sara* (6) had decided that he had no such lien, it was held that the master's claim in respect of such disbursements and liabilities takes precedence over that of a mortgagee. See also *The Fairport* (7), and it is every-day practice for the interests of mortgagees in vessels to be subjected to maritime liens for damage and other claims. It is said that the case of a mortgagee is affected by the provisions of s. 34 of the Merchant Shipping Act, 1894, which repeats the similar provisions of earlier Acts, but I believe that the foundation for the rules as to a mortgagee's position is to be found in the same principle as that upon which the judges have acted in the cases of the charterers above referred to. The mortgagee is towards an owner in possession much in the same position as an owner towards a charterer in

(1) Sw. 215.
(2) 2 Asp. M. L. C. 475.
(3) Lush. 266.
(4) (1865) L. R. 1 A. & E. 8.
(5) (1868) L. R. 2 A. & E. 65.
(6) (1889) 14 App. Cas. 209.
(7) (1882) 8 P. D. 48.

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possession. The vessel is permitted by a party interested in her to be in another's possession and employed so as to become subject to maritime liens. I may notice in passing that in the present case the eight-sixty-fourth shares standing in the name of Neil, M'Lean & Co., though mortgaged, are therefore subject to the plaintiff's claims. Even at common law, if a vessel is left by a mortgagee in the possession of the mortgagor the rights of the mortgagee are subject to any possessory lien which exists for work done to the ship by the orders of the mortgagor: *Williams* v. *Allsup*. (1) This is on a similar principle to that which I have indicated. So also a maritime lien for damage takes precedence of the claim of a bottomry bondholder under a bond given prior to the time when the damage is done: *The Aline*. (2)

The principle upon which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her who have allowed the owners to remain in possession are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognised by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority.

In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her; and I consider that it is also right and reasonable that persons who have rendered

(1) (1861) 10 C. B. (N.S.) 417. (2) (1839) 1 Wm. Rob. 111.

services to a vessel under circumstances which entitle them to treat her as owned by the persons in possession should have the same rights against the vessel as if her real owners had been in possession. On the other hand, the persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorized those persons to subject the vessel to those claims. According to the principle I have stated, claims arising in cases like *The Druid* (1), *The Orient* (2), and *The Ida* (3) cannot be enforced against the vessel, because they arise out of unlawful acts done without any authority and beyond anything which ought to be contemplated in the ordinary use of the vessel. And in cases like *The Turgot* (4) and *The Castlegate* (5) the persons dealing with the charterers have not been entitled to treat, nor have they treated, the vessel as owned by the charterers, but have dealt with them on their credit, and not upon the faith of having the security of the vessel. They have not, in fact, relied on any presumed authority derived from the owners. But in claims arising in cases like *The Ticonderoga* (6), *The Ruby Queen* (7), and *The Lemington* (8) the claims arose from acts occurring in the ordinary employment of the vessel in the manner authorized.

With regard to the wages of masters and crews, apart from statute law, the same principles should apply, but, according to what Lord Watson says in *The Castlegate* (5), the Legislature has recognised the rule that the lien for them attaches independently of any personal obligation of the owners. Upon the proposition under consideration I may further observe that a maritime lien arises in cases of bottomry and respondentia, although the owners of the property are not personally liable. This is because the master is not authorized to make the owners of the property personally liable, and the lender makes his loan

(1) 1 Wm. Rob. 391.
(2) L. R. 3 P. C. 696.
(3) Lush. 6.
(4) 11 P. D. 21.
(5) [1893] A. C. 38.
(6) Sw. 215.
(7) Lush. 266.
(8) 2 Asp. M. L. C. 475.

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on the security of the property and not on the credit of the owners. Lastly, as pointed out above, a maritime lien travels with the vessel into whosesoever possession it comes, so that an innocent purchaser of a ship may find his property subjected to claims which existed prior to the date of his purchase, unless the lien is lost by laches or the claim is one which may be barred by the Statutes of Limitation. This rule is stated in *The Bold Buccleugh* (1) to be deduced from the civil law, and, although it may be hard on an innocent purchaser, if it did not exist a person who was owner at the time a lien attached could defeat the lien by transfer if he pleased.

The facts of the present case are stronger in favour of the lien than those in the charterers' cases, and render the case very similar to that of a mortgagee. The *Ripon City* had been delivered to Neil, M'Lean & Co. under the contract of November, 1895. Eight-sixty-fourth shares were transferred to the buyers and the sum of 1000*l.* was paid by them; but the remaining shares remained registered in the sellers' names, and when they were to be transferred a mortgage was to be given to secure the unpaid purchase-money. So that practically the buyers were owners, and the sellers were in a similar position to that of mortgagees in respect of the purchase-money remaining unpaid. The sellers allowed Neil, M'Lean & Co. to have the possession and control of the vessel, to hold themselves out to the plaintiff as managing owners of the vessel, to appoint him to command her, and to place him in a position in which he was entitled to make disbursements and incur liabilities on account of the ship. In the articles Neil, M'Lean & Co. were described as the managing owners, and I think that the plaintiff was clearly entitled to treat, and did treat, them as managing owners. He had no notice of any facts which would deprive him of his right of lien, and, in my opinion, he was entitled to look to the ship as security for his claims in question. If this were not so, a master of a ship in the plaintiff's position would be subjected to great injustice. He would be deprived of the security upon the faith of which he undoubtedly acts. His position is entirely different from that of the master of the *Castlegate*, who incurred

(1) 7 Moo. P. C. 267.

liabilities on behalf, and on the credit, of the charterers when he knew that the ship was not theirs, and that his owners had not authorized him to pledge their credit.

I consider that the case falls within the principle I have endeavoured to arrive at, and I hold that the plaintiff had a maritime lien on the vessel for the amount of the bills.

The third point, that the settlement is an answer to the action, may be more shortly disposed of. It was not suggested that the plaintiff and Messrs. Cory were not legally entitled as against Furness, Withy & Co. to make the arrangement which they did, and I am not required to express an opinion on this matter. The contention raised by the defendants was that Furness, Withy & Co. had no knowledge or notice of the document of February 13, 1897, and Messrs. Cory's contention was that Furness, Withy & Co. had notice or knowledge of the arrangement between the plaintiff and Messrs. Cory, and that the settlement is fraudulent and void as against them. Messrs. Cory had dealt with the steamer as if she belonged to Neil, M'Lean & Co., and had supplied her with coal under their contract with no knowledge that their buyers were not fully entitled to the vessel. They naturally considered that the plaintiff, who was liable to them, ought to enforce his rights for their benefit, and that he, although liable on the bills, ought not to be left to bear the burden of the responsibility. They therefore obtained from him the document above mentioned and forbore to sue him at once for the debt. Under this document Messrs. Cory by agreement with the plaintiff acquired the right to use his name to enforce for their own benefit his claims in respect of the two bills against the ship. They then took these proceedings in the plaintiff's name. I think it may be true that Furness, Withy & Co. had no express notice of this document and that they may have thought themselves justified in taking the course they adopted; but I must notice that, although Mr. Stoker and Mr. Hull stated that they had no notice of the document, there is no evidence from Mr. Donald on the subject, and I am satisfied from the evidence that Furness, Withy & Co. knew that the plaintiff had been taken by Messrs. Cory to their solicitors, that the action was really

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brought by Messrs. Cory in the plaintiff's name, and that there must have been an arrangement between them for that purpose. The legal position of the parties was, I have no doubt, fully appreciated by Furness & Co., and their whole conduct shews how fully alive they were to the necessity of stopping the proceedings in some way. Why did they go to the plaintiff instead of dealing in a straightforward way with Messrs. Cory's solicitors? Because they knew that it would be useless to do so. Why did they not tell their own solicitors what they were going to do? Because their own solicitors, a firm of high standing in the City, would at once have told them they were not acting fairly to Messrs. Cory, and that they ought to fight out their respective rights without any settlement with the nominal plaintiff. Their action placed Messrs. Cory in a difficult position as to the proof of formal matters. The master, after acting as he has done, was conspicuous by his absence from the trial, and the case was only proved by Messrs. Cory's counsel calling as witnesses Mr. Stoker and Mr. Hull. Mr. Donald, who seems to have first approached the plaintiff, was not in court, so that what took place between them was not disclosed except so far as the other two witnesses just mentioned stated it.

I am of opinion that Furness, Withy & Co. had sufficient notice or knowledge of the facts to render the settlement void as against Messrs. Cory. No distinction was taken in argument between the position of the shares in the vessel held by Furness, Withy & Co. and the other shares. The eight-sixty-fourths belonging to Neil, M'Lean & Co. I have pointed out must be liable, and the four or five other shareholders seem to have left Furness, Withy & Co. to act for them in respect of the vessel. The 400*l.* paid to the plaintiff was more than enough to cover the claims other than Messrs. Cory's.

My judgment is for the plaintiff against the defendants, and their bail, for the sum of 1243*l.* 14*s.* 6*d.*, the amount of the two bills, with interest at 4 per cent. per annum on the amount of the bills respectively calculated from their respective due dates, and costs. I may add that in considering this case the conclusion is forced upon me that it would be more satisfactory if

further legislative provisions were made with regard to the claims of persons who supply necessaries to vessels.

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Solicitors for plaintiff: *Ince, Colt & Ince.*

Solicitors for defendants: *W. A. Crump & Son.*

T. L. M.

[IN THE COURT OF APPEAL.]

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March 3.

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Admiralty — Collision — Narrow Channel—Swin Middle Lightship—Risk of Collision—Arts. 18 *and* 21 *of the Regulations for Preventing Collisions at Sea*, 1884.

A collision occurred at night, between the plaintiffs' steamship, inward-bound, and the defendants' steamship, outward-bound, in the Swin Channel at the entrance to the River Thames, about half-way between the Swin Middle Lightship and the North-East Maplin Buoy. Both vessels were found to blame for not reducing speed under art. 18 of the Regulations of 1884 for Preventing Collisions at Sea.

The plaintiffs appealed on the ground that, by reversing at a quarter of a mile, their vessel had complied with art. 18:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes, and Chitty L.JJ.), affirming the decision of Gorell Barnes J., and on the authority of *The Beryl*, (1884) 9 P. D. 137, that the officer in charge of the plaintiffs' vessel having the green light of the defendants' vessel at a distance of half a mile on his port bow crossing to the wrong side of the channel, was not justified, before he stopped and reversed, in waiting to see if there would be a change of light until the vessels were only a quarter of a mile apart.

The plaintiffs' vessel, just prior to the collision, had passed to the southward and eastward of the Swin Middle Lightship, in accordance with the practice sanctioned by the cases of *The Minnie* and *The Corennie*, [1894] P. 336, and 338, n.:—

Held, by Gorell Barnes J., that as any difficulty in the navigation at this part of the river has now been removed by making the North-East Maplin Buoy an occulting gas-light buoy, reliance can no longer be placed on those two cases, and inward-bound steamships must treat the Swin Middle Lightship as midway in a narrow channel, and, when safe and practicable, pass it on their port hand, in order to comply with art. 21 of the Regulations of 1884. (1)

APPEAL by plaintiffs, the owners of the *Opal*, from so much of a decision of Gorell Barnes J. as found their steamship to blame for a collision with the defendants' steamship *Oporto*.

(1) Now art. 25 of the Regulations of 1897.

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The case is reported on the question of the proper navigation, for inward-bound vessels, of the East Swin Channel in the estuary of the Thames since the establishment of the North East Maplin Gas Buoy, and as to the proper time for those in charge of a steamship in the right to act to avoid risk of collision with a wrong-doing vessel.

The facts, so far as material, were shortly that—

On August 29, 1896, about 10.20 P.M., the weather being fine and clear, the plaintiffs' steamship *Opal*—of 727 tons net and 1124 tons gross register, and a crew of sixteen hands, inward-bound from Methill to London with coals—was in the East Swin Channel in the estuary of the Thames, steering S.W. by W. from the Whitaker Gas Buoy to the Middle Lightship, and making about eight to nine knots an hour through the water, the tide being first-quarter flood of the force of about a knot an hour. When about halfway to the lightship, the masthead and green lights of the defendants' steamship *Oporto* —of 319 tons net register, and a crew of thirteen hands, outward-bound from London to Sunderland with a part general cargo—were seen about two points on the port bow and from two to three miles distant. In order to pass the Middle Lightship about half a ship's length off on the starboard hand, the helm of the *Opal* was starboarded about a quarter of a point, and then steadied. Shortly after the *Opal* sounded one short blast on her whistle, ported three-quarters of a point, and steadied at about S.W. by W. ½ W. magnetic to pass the *Oporto* port to port, the green light of the *Oporto* being then about three points on the port bow, and the *Opal* expecting the *Oporto* to open her red. The *Opal* came on to about abreast of the Bell Buoy, blew another short blast, and ported again. On the *Oporto* sounding two short blasts, the engines of the *Opal* were stopped and reversed full speed, her whistle was sounded one short blast, and her helm hard-a-ported; but the stem and port bow of the *Opal*, which vessel was then heading about W., came into collision with the starboard side about amidships of the *Oporto*, that vessel heading at the time about N.N.W., and the blow being at an angle of about two points from a right angle leading forward. Both vessels sustained considerable damage.

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The case of the *Oporto* was that she was proceeding at about ten knots an hour on a course N.E. by N. ¼ N. magnetic, when, shortly after passing the Maplin Light, those in charge of her saw the masthead and red lights of the *Opal* about one to one and a half points on the starboard bow and three to four miles distant. On the red light being shut in and green opened, the *Oporto* blew two short blasts, starboarded her helm one-half to three-quarters of a point, and then steadied, the vessels approaching green to green until about half a mile distant, when the *Opal* shewed her red light for an instant and, on shutting it in, the *Oporto* blew two short blasts and again starboarded her helm. The *Opal* came on shewing her masthead and green lights until she was about a quarter of a mile off on the *Oporto's* starboard bow, when she shut in her green and opened her red light. The *Oporto* blew two short blasts, hard-a-starboarded her helm, stopped her engines momentarily, and then put them full speed ahead as the only means of avoiding a collision, which however occurred about halfway between the Swin Middle Lightship and the North-East Maplin Gas Buoy, and about 400 yards to the northward and westward of a line drawn from the lightship to the gas buoy.

Each vessel charged the other with a breach of art. 18 (1) in not stopping and reversing in time, and also with a breach of art. 21 (2) in failing to keep to that side of the channel which lay on her starboard hand.

1896. Nov. 30; Dec. 1, 2. *Sir Walter Phillimore* and *Butler Aspinall*, for the plaintiffs, the owners of the *Opal*.

Aspinall, Q.C., and *Lewis Noad*, for the defendants, the owners of the *Oporto*.

The arguments of counsel fully appear from the judgment.

(1) Regulations for Preventing Collisions at Sea, 1884:—

"Art. 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary."

(2) "Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship." (Now art. 25 of the Regulations of 1897.)

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[In addition to the cases cited in the judgment, the cases of *The Fyenoord* (1) and *Wilson* v. *Currie* (2) were referred to.]

Cur. adv. vult.

Dec. 8. GORELL BARNES J. This case is one of considerable importance, because it involves the consideration of matters affecting the proper navigation of the Swin Channel at the entrance of the River Thames.

[The learned judge then dealt with the facts already set out, and continued:—]

The first point to determine is, whether or not the green light of the *Opal* was seen, as the defendants allege. Having regard to the original courses of the vessels, it is not at all probable that the *Opal* would starboard at some distance before the lightship, so as to shew her green light to the *Oporto*; and although it is possible, if the *Opal* starboarded for the lightship more than her witnesses say she did, that her green light might have been shewn for a short time as the *Opal* was passing the lightship (I see no reason, however, why she should have done so), it is clear from the place where the vessels collided that the red light of the *Opal* must have been open to the *Oporto* almost from the lightship to the place of collision.

The master of the *Opal* gave his evidence as to the manœuvres with his helm with great clearness, and the conclusion of fact at which I have arrived is that the green light of the *Opal* was not shewn to the *Oporto*, as the defendants' witnesses say. I find that the *Oporto* wrongly starboarded while on the port bow of the *Opal*, and came out of her own water to the place of the collision, which was on the wrong side of the channel for the *Oporto*, and it follows that, as the *Oporto* was starboarding with the red light of the *Opal* open to her for a long time, the *Oporto* was also to blame for continuing at full speed in face of obvious danger, and not stopping and reversing her engines in accordance with art. 18 of the Regulations of 1884 for Preventing Collisions at Sea.

(1) (1858) Sw. 374. (2) [1894] A. C. 116.

These findings leave two points which were made against the *Opal* to be considered. First, it was said that she ought to have stopped and reversed her engines before she did. [The learned judge examined the evidence on this point, and continued:—]

The stem of the *Opal* appears to have penetrated the *Oporto*'s side to the extent of about two feet ten inches, and I think that the engines of the *Opal* could not have been reversed when the ships were further apart than about a quarter of a mile, and this is the opinion of the Elder Brethren. I have asked them whether in their opinion the master of the *Opal* was justified in assuming that the *Oporto* would port her helm and pass his vessel port side to port side, and could do so without difficulty up to the time when he stopped and reversed his engines, which they are to take him to have done, at not more than a quarter of a mile off. Their answer is, that he was not so justified. They think that, having regard to the place of collision and the courses which the vessels must have followed in order to get there, it must have been obvious to the master of the *Opal* that the *Oporto* was going out of her proper course, and was crossing to the north-west side of the channel, when the vessels were at the very least half a mile apart, and probably more than this, and that the master of the *Opal* ought to have eased his speed the moment when the improper course of the *Oporto* was observable, and should have stopped and reversed his engines long before he did. Upon this ground, although I feel that the principal blame for the collision rests with the *Oporto*, I must condemn the *Opal* for not having complied with the peremptory provisions of art. 18.

The second point taken against the *Opal* was that she infringed the provisions of art. 21 by passing the Middle Lightship on her starboard hand.

Having found against the *Opal* on the first point, it is not necessary to the decision of this case that I should determine the second point. But as it is a point of very great importance to those navigating the Swin Channel, and affects the future navigation of this locality, I propose to make some observations upon it.

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It was stated by the master of the *Opal* that when inward-bound he was in the habit of passing to the south-eastward of the Middle Lightship, leaving it on his starboard hand; and by the master of the *Oporto* that he expected the *Opal* to pass the lightship in this manner; and from the evidence of Barrett, the master of the Middle Lightship, it appears to be the practice for vessels inward- and outward-bound to treat the channel for navigation past the lightship as being to the south-eastward of that vessel, and for the great majority of inward-bound vessels to pass it on the starboard hand. This witness, who was called, I believe, in one or two of the previous cases to which I will refer, stated that after giving evidence in the second of these cases in June, 1894, he and his assistants took particulars of the numbers of vessels passing his lightship in the week ending June 24, 1894, with the following results: Vessels passing to the south-eastward of the lightship inward-bound, 211; outward-bound, 272. Vessels passing to the north-westward of the lightship, inward-bound, 7; outward-bound, 3. He also gave similar particulars from November 23 to 26, 1896, with the following results: Vessels passing to the south-eastward of the lightship, inward-bound, 108; outward-bound, 144. Vessels passing to the north-westward of the lightship, inward-bound, 14; outward-bound, 1. I understand that these figures refer to steamships only. There seems no doubt that up to the present time the great majority of inward-bound vessels have kept to the eastward of the lightship.

The case of *The Corennie* (1), tried before me and two of the Elder Brethren in March, 1893, is reported shortly in a note to *The Minnie*. (2) The collision appears to have taken place in the Swin Channel, and I find it stated as follows: [The learned judge read the note to the effect that the inward-bound vessel followed the recognised practice in passing to the south and east of the Swin Middle Light.]

In the case of *The Minnie* (2) the collision is stated to have occurred a little above the Swin Middle Lightship and a little to the westward of the direct course from that lightship to the East Maplin Buoy, which would therefore be not far from the

(1) [1894] P. 338, n. (2) [1894] P. 336.

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place where the collision in question in the present case occurred.

That case was tried in June, 1894, before my brother Bruce, who was then sitting for me, and was afterwards heard on appeal in the Court of Appeal on July 26 and 27, 1894. The inward-bound steamer, the *Freda*, passed to the south-eastward of the Middle Lightship, and was not blamed for so doing. In the course of his judgment Lord Esher M.R. said: "The question here must be, what is the proper navigation for two steamships, one coming in from the sea, and the other going out to sea, when they are passing each other between the Middle Lightship and the North-East Maplin? It is an admitted part of that navigation that they are both to pass to the eastward of the Middle Lightship; but the space between the Middle Lightship and the Middle Sands is a very narrow passage. It is a narrow passage, not within the River Thames, so as to make any legislation with regard to the river apply, but it is on the sea, approaching a port through a narrow channel, and in my opinion in those circumstances the 21st rule applies." And further on he says: "The inward vessel should pass the lightship close, and then steer the channel course, keeping the Maplin Spit Light a little on the starboard bow so as to be safe from that, and though for her own safety she may keep the Maplin Spit a little on her starboard bow, so as to enable her to pass the North-East Maplin Buoy, she will be doing nothing wrong with regard to the other ship if she goes more to the westward than that line. She puts herself into a difficulty, but not the other vessel, by doing that. Therefore she ought to go close to the Middle Light, which is for the purpose of giving all possible room for the other vessel to pass her port side to port side. When she has passed the Middle Light she ought not to go to the eastward, but may go somewhat to the westward of the light of which I have spoken."

In the verbatim report of my judgment in *The Corennie* (1), given by the *Shipping Gazette* of March 21, 1893, a reason is referred to for inward-bound vessels passing to the south-

(1) [1894] P. 338, n.

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eastward of the lightship, which was given by the master of the *Caroline*, with which vessel the *Corennie* collided. He is stated to have said that if he went to the north of the lightship he would have nothing to guide him in coming out; and that there are no buoys in the bay, which is just after the Swin Middle Light is passed as vessels come up. The conditions which existed at the time when the collision in the two cases above mentioned occurred are, however, altered now. After the collision between the *Freda* and the *Minnie*, though before the judgment of the Court of Appeal, the Trinity House altered the North-East Maplin buoy into a gas buoy by substituting for the old buoy a buoy with an occulting gas-light, which now indicates to vessels inward bound the point to the eastward of which, after passing the Swin Middle Lightship, they must pass in order to clear the shoal water of the Maplin Sand, and appears to obviate the difficulty mentioned in the evidence in the case of the *Corennie*, to which I have already alluded. The Swin Middle Lightship is midway between the Middle Sands and the Foulness or Whitaker Sands, and the navigable channel lies equally on each side of the lightship, and before the alteration of the North-East Maplin Buoy into a gas buoy the practice of inward-bound vessels passing to the southward and eastward of the lightship by night may have been justified, because it may have been prudent that such vessels should not incur the danger of being set over towards the Foulness or Maplin Shoals without having a guide other than the distant Maplin Lighthouse and the Maplin Spit Buoy to enable them to clear these shoals; and the same course was followed in the daytime, possibly in accordance with the night practice.

But the question now is, What is the proper navigation of the channel for inward-bound vessels since the establishment of the North-East Maplin Gas Buoy? Upon this point I have asked the advice of the Elder Brethren who assist me. They have been good enough to prepare a memorandum which gives a short account of the lights and buoys so far as is necessary for the discussion of the matter before me, and I may perhaps conveniently read this. It concludes with an expression of opinion upon the point upon which I have sought advice, and

I am informed that they have consulted their colleagues upon the point, and that the expression of opinion is that of the whole body of the Trinity House. (1)

(1) The memorandum is as follows:—

"Navigation past Swin Middle Light-vessel: The light-vessel, which had been established in 1837 was moved S.W. by W. ½ W. 2 cables on 30th October 1878 [Trinity House Notice No. 144 of 1878] on account of the Middle Sand having grown out to the south-westward, but both before and since this date the Swin Middle Light-vessel has been a fairway and mid-channel sea-mark capable of being passed on either side. This is shewn by the Admiralty Charts 1610 of I. 71, and 1975 of V. 81, on which the lines of navigation are depicted. The S.W. Middle Buoy was also moved at the same time as the movement of the light-vessel.

"On the 4th January, 1892, the Whitaker Buoy was lit with an occulting white gas-light [Trinity House Notice No. 2, of 1892] and on 26th November, 1892, the South Whitaker Buoy was established [see Trinity House Notice, No. 34, of 1892]. The South Whitaker Buoy in line with the Whitaker Buoy indicates by day the western edge of the navigable channel abreast the light-vessel. On 2nd July, 1894, the North-East Maplin Buoy was lit with an occulting white gas-light [see Trinity House Notice, No. 30, of 1894]. On the 7th October, 1895, the power of the Swin Middle Light was increased from 3500 candles to 20,000 candles, but as the character of the light remained the same, viz., white revolving every half minute, a notice to mariners on the subject was not issued. The lighting of the North-East Maplin Buoy is of use to vessels proceeding north, outward bound, at night in enabling them to judge their distance from that point, and in line with the Maplin Lighthouse light gives them a guide for ascertaining how far they can keep over to the eastward, as, after passing it, they can tell how far to the eastward they are at liberty to keep without fouling the S.W. Middle Bell Buoy or grounding on the Middle Shoal. The light on the N.E. Maplin Buoy in line with the Maplin Lighthouse light just clears the buoy. The light on this buoy also enables vessels proceeding to the southward, inward-bound, at night to pass with greater confidence than they could do before to the westward of the Swin Middle Light-vessel, and thus keep clear of the traffic proceeding north, as it clearly indicates the point short of which they must turn out to the eastward so as to avoid the shoal water off the Maplin Sand. A large proportion of the steamer traffic going south has hitherto passed to the eastward of the Swin Middle Light-vessel, possibly on account of having got into the habit of doing so before the N.E. Maplin Buoy was lit, and also to cut the corner off, and to steer one course from the Swin Middle Light-vessel to a position off the Maplin Lighthouse. The Trinity House was fully aware of this practice, and considering it fraught with danger of collision between vessels of the two streams of traffic, and for which there is now no legitimate reason, either by night or day, they had, before the present action commenced, framed a draft notice to mariners with the view of inducing the southern stream of traffic to keep to the westward of the Swin Middle Light-vessel in passing

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I understand that the words "as far as practicable" in this opinion are intended to cover cases where wrecks, or obstructions, or other circumstances may affect the ordinary navigation of the channel. This opinion shews that the present practice of inward-bound steamers passing to the south-eastward of the Swin Middle Lightship is wrong, and that in future inward-bound vessels, to which art. 21 (1) applies, taking this course will render themselves liable to the risk of being blamed for so doing. It is obvious from an inspection of the chart that the space for vessels to pass, if both inward- and outward-bound vessels pass to the south-eastward of the lightship, is very narrow, and that the navigation of this channel, so far as risk of collision is concerned, is much greater if the inward-bound vessels keep to the south-eastward of the lightship than if they pass to the north-westward of it, especially as at night an inward-bound vessel passing to the north-westward will not run the same risk of opening her green light to an outward-bound vessel as she would do if keeping to the south-eastward.

If the *Opal* had been free from blame in other respects I should have desired to consider this case further before holding that she was to blame for passing to the south eastward of the lightship, notwithstanding the foregoing opinion, because, although I must have found that at the time of this collision it

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her, that being now by far the safest course to pursue by day and night. The issue of this notice has been suspended pending the result of the present trial. The present sea-marks form a sufficient and ample guide to the channel, and enable this course to be pursued. A light-vessel in the channel must always to a certain extent form an obstruction to those on a vessel looking for the lights of another vessel on the opposite side of the light-vessel to themselves. This is especially the case at the Swin Middle, where the revolving half-minute light is a very powerful one. For this reason it behoves mariners to pass the light-vessel, leaving it on their port hand, so as not to cross the stream of traffic going in the opposite direction, and not to contribute to the danger of collision. The Elder Brethren (including those who sat as assessors in the actions of the *Corennie* and *Minnie*) are unanimously of opinion that a channel, navigable by day and night, exists on each side (east and west) of the Swin Middle Light-vessel, and that vessels should as far as practicable pass this light-vessel leaving her on their own port hand. (Sd.) G. R. Vyvyan. (Sd.) H. Stewart."

(1) Art. 25 of Regulations of 1897.

was safe and practicable, and the proper course for her to have passed to the north westward of the lightship, still, there being the decisions of this Court and the Court of Appeal upon what was the proper channel at the part in question, and no case in which the effect of the alteration by the establishment of the North-East Maplin Gas Buoy has been considered, and no public notice or pronouncement of or upon the effect of this alteration, it would scarcely seem reasonable to condemn the *Opal* because she did not originate a new departure.

Moreover, in the present case the point has no merits, because the master of the *Oporto* expected the *Opal* to pass to the south-eastward of the lightship, and knew that she was so passing when she was at least two miles away, and even if the rule were broken, so as to leave it open to contention that such breach did contribute, or at any rate might by possibility have contributed to the collision, as a matter of fact, in my opinion, the breach had really nothing to do with the collision.

As I have said, however, I do not find it necessary to determine the second point made against the *Opal*, but, for the reasons which I have given, both vessels must be held to blame.

1897. March 3. The owners of the *Opal* appealed against so much of the judgment as condemned their vessel for infringing the provisions of art. 18 of the Regulations for Preventing Collisions at Sea, 1884.

Sir Walter Phillimore, and *Butler Aspinall*, for the appellants (plaintiffs), the owners of the *Opal*. The two points taken in the Court below against the *Opal* were—first, that those in charge of that vessel ought under art. 18 to have acted earlier with their engines; and, secondly, that the *Opal* ought, under art. 21, to have passed to the northward and westward of the Swin Middle Light.

[LORD ESHER M.R. If we decide the first point against the appellants it will be unnecessary to discuss the second point.]

That is so. With regard to the first point, it is submitted

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that those in charge of the *Opal* complied with the provisions of art. 18 by reversing at a distance of a quarter of a mile. The question how long the vessel in the right is entitled to hold on when the light in sight may alter at any instant by the wrong-doing vessel correcting her mistake was discussed in *The Beryl* (1); but in that case the vessel at first in the right only slackened at from a quarter to half a mile distant, and did not stop and reverse until within 300 yards of the wrong-doing vessel; but here the *Opal* reversed at a quarter of a mile, and at that distance the *Oporto* could still without difficulty, by a touch of the port helm, have corrected her mistake and got out of the way of the *Opal*. No case has gone the length of condemning an officer for not reversing sooner than at a quarter of a mile.

[The cases of *The Khedive* (2) and *Wilson* v. *Currie* (3) were referred to.]

Aspinall, Q.C., and *Lewis Noad*, for the respondents (defendants), the owners of the *Oporto*, were not called upon.

LORD ESHER M.R. I have asked the gentlemen who assist us these two questions: "Was the officer of the *Opal* justified as a sailor in supposing, until he was within a quarter of a mile of the other ship, that the *Oporto* would keep out of his way and could do so without difficulty?" The answer is, "No." The second question is: "At a quarter of a mile, could the *Oporto*, considering the courses and position of both, have avoided risk of collision, unless the *Opal* had at the same time stopped, or stopped and reversed?" The answer is, "No." These answers seem to me to make it unnecessary to hear the other side.

Sir Walter Phillimore. I respectfully submit that the second question is not right, and that it should have been: "At a quarter of a mile could the *Oporto*, without difficulty, have kept out of the way of the *Opal?*"

(1) 9 P. D. 4, 137. (2) (1880) 5 App. Cas. 876.
(3) [1894] A. C. 116.

LORD ESHER M.R. I have asked our assessors exactly the question asked in the case of *The Beryl.* (1) That makes the appeal fail.

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LOPES and CHITTY L.JJ. concurred.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Thomas Cooper & Co.*

Solicitors for respondents (defendants): *William A. Crump & Son.*

T. L. M.

IN THE GOODS OF BALME.

1897 *April* 12.

Probate—Will—Incorporated Document—Library Catalogue.

A testator made a bequest to a college of his books as enumerated in his library catalogue, a voluminous document, a copy of which would entail considerable expense. Probate was granted of the will without requiring the catalogue to be brought into the Probate Registry under rules 12, 13 of the Rules of 1862, the college undertaking to hold the catalogue for the registry, and a note to that effect being made upon the probate.

E. B. W. BALME, who died on October 18, 1896, by his last will and codicils thereto made a bequest of all his books enumerated in his library catalogue, with certain exceptions, to Selwyn College, Cambridge. Upon application by the executors for probate, the registrar required them to bring the catalogue into the registry with a view to its being included in the probate. The executors desired to deposit the catalogue in the library of Selwyn College, to which the special legatee of the books excepted from the bequest to the college assented; there was no other party interested. To make a copy of the catalogue would cost 15*l.*; to engross it 200*l.*

Pritchard (*Gwynne Hall* with him), for the executors. It is unnecessary to bring the catalogue into the registry; it is not a document forming a constituent part of the will within the

(1) 9 P. D. 137, at p. 142.

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meaning of rules 12, 13 of the Rules of 1862. If, however, it is within the operation of those rules, the college will undertake to hold it for the Probate Registry, and to produce it when required.

Blakesley, for the college, assented to this course.

SIR F. H. JEUNE, PRESIDENT. The theory upon which the practice of the Court is founded is that a will and all documents connected with it may be inspected by the public, an exception being made in the case of things which cannot be left at the registry. This catalogue appears to me to be a testamentary document; but there is no doubt that it would be highly inconvenient that it should be left in the registry. I am not aware of any precedent for the course suggested; but I think it is a reasonable one and may properly be adopted. There will be a note on the probate that the catalogue is in the care and custody of the college, who have undertaken to hold it for the Probate Registry.

Solicitors for executors: *Sandilands & Co.*

Solicitors for Selwyn College: *Ranken, Ford, Ford & Chester.*

W. J. B.

MOSS *v.* MOSS (OTHERWISE ARCHER).

1897
May 20;
June 4.

Divorce—Nullity—Fraud—Pregnancy of Wife by another Man at Time of Marriage—Concealment by Wife from intended Husband.

Concealment by a woman from her husband at the time of her marriage of the fact that she is then pregnant by another man does not render the marriage null and void.

SUIT by the husband for nullity of marriage on the ground of fraud on the part of the respondent.

The petitioner, a groom, had made the acquaintance of the respondent, a nurse in the same service, in 1889. In 1892 the petitioner went abroad, and on his return to England in 1895 became engaged to the respondent. In December, 1895, the petitioner, who was in service in Derbyshire, came to London with his master for three weeks, and while there met the respondent on several occasions. In June, 1896, he saw her at her father's house in Suffolk, when she pressed him to marry her, which he arranged to do in the following September. On September 29 the marriage took place, and on that day the petitioner's suspicions were for the first time aroused as to the respondent's condition, and he taxed her with being pregnant, which she denied at the time; about a week later she admitted her condition, and gave to the petitioner the name of the man whom she alleged to be her seducer. The petitioner then separated from her, and on October 17 a child was born. At the hearing several witnesses were called, relations of the parties, who all stated that they had no reason to suspect the respondent's condition at the time of the marriage. At the conclusion of the evidence in the case, which was undefended, the President intimated that he was satisfied that the petitioner did not know of his wife's condition; and that he had no grounds for making any inquiry as to her character.

Owing to the importance of the case, and its being undefended,

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the facts alleged in the petition had by direction of the President been placed before the Queen's Proctor with a view to the question of law being argued.

Deane, Q.C., Ram, and *Marchant,* for the petitioner. Admitting that there is no decision in the English Courts that concealment by the wife from her intended husband of her pregnancy at the time of the marriage is a ground for a decree of nullity, the case nevertheless falls within the principle of law which avoids a contract on the ground that the consent of one of the parties has been obtained by fraud. The validity of a contract of marriage depends upon the same considerations as the validity of any other contract, and must be tested in the same way. There must be consent by both parties, with a knowledge on their part of all material facts; here a material fact was suppressed by the respondent. The respondent's conduct was a fraud on the husband, for the presumption is that any child born in wedlock is his, and he might be called on to support another man's child. The pregnancy of the respondent rendered her incapable at the time of the marriage of bearing a child to her husband, and, being concealed, constituted a fraud in the essentialia of the marriage relation. In certain of the United States it is clear law that concealed pregnancy is a ground of nullity of marriage: *Reynolds* v. *Reynolds* (1); and in Massachusetts under such circumstances evidence of an express representation of chastity by the wife before marriage is unnecessary: *Donovan* v. *Donovan.* (2) In Pennsylvania such concealment raises a question for the jury under the direction of the Court whether the facts afford a ground which would entitle the husband to disown the marriage: *Allen's Appeal.* (3)

[They also cited *Scott* v. *Sebright* (4); *Turner's Marriage Bill* (5); *Foss* v. *Foss* (6); *Crehore* v. *Crehore* (7); *Rex* v.

(1) (1862) 85 Mass. (3 Allen) 605.
(2) (1864) 91 Mass. (9 Allen) 140.
(3) (1881) 99 Penn. 196.
(4) (1886) 12 P. D. 21.
(5) (1827) 59 Lords' Jour. 351; 17 Hansard (2nd Series), 787, 875, 1134.
(6) (1866) 94 Mass. (12 Allen) 26.
(7) (1867) 97 Mass. (1 Browne) 330.

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Burton-on-Trent (1); *Aylesford Peerage Case* (2); Bishop on Marriage, ed. 1891, s. 485; Fraser on Husband and Wife, vol. i. p. 451.]

Inderwick, Q.C., and *Guy Stephenson*, for the Queen's Proctor. All the essentials of a valid contract of marriage were present in this case—namely, intelligent consent, free agency, competent age and physical capacity, and compliance with statutory requirements. Fraud is not a ground for annulling a marriage except where it is of such a nature as to be inconsistent with the idea of there having been a real and intelligent consent by one of the parties. Marriage, although based on the contract of the parties, is not merely a contract in the ordinary legal sense of the term; it creates a status: *Niboyet* v. *Niboyet* (3), per Brett L.J.; *Sottomayer* v. *De Barros* (4), per Lord Hannen. The objection that the wife is under the circumstances incapable of bearing children to her husband is answered by the fact of its being at most a temporary disability. The decisions of the American Courts that have been cited are in conflict with the views of English law on the subject, and should not be followed.

[They also cited *Miles* v. *Chilton* (5); *Andrews* v. *Ross* (6); *Turner* v. *Meyers* (7); *Durham* v. *Durham* (8); *Hunter* v. *Edney* (9); *Cannon* v. *Smalley* (10); *Portsmouth* v. *Portsmouth* (11); *Cooper* v. *Crane* (12); *Ford* v. *Stier* (13); *Bartlett* v. *Rice* (14); *Fielding's Case* (15); *Wakefield* v. *Mackay* (16); *Ewing* v. *Wheatley* (17); *Sullivan* v. *Sullivan* (18); *Swift* v. *Kelly* (19); *Miss Turner's Case* (20); *Templeton* v. *Tyree* (21); Ayliffe's Parergon, p. 362 et seq.]

Deane, Q.C., in reply.

Cur. adv. vult.

(1) (1815) 3 M. & S. 537.
(2) (1885) 11 App. Cas. 1.
(3) (1878) 4 P. D. 1, 11.
(4) (1879) 5 P. D. 94, 101.
(5) (1849) 1 Rob. 684.
(6) (1888) 14 P. D. 15.
(7) (1808) 1 Hagg. Cons. 414.
(8) (1885) 10 P. D. 80.
(9) (1881) 10 P. D. 93.
(10) (1885) 10 P. D. 96.
(11) (1828) 1 Hagg. Ecc. 355.
(12) [1891] P. 369.
(13) [1896] P. 1.
(14) (1894) 72 L. T. 122.
(15) (1706) 14 St. Tr. 1327.
(16) (1807) 1 Phillim. 134, n.
(17) (1814) 2 Hagg. Cons. 175.
(18) (1818) 2 Hagg. Cons. 238, at p. 246.
(19) (1835) 3 Knapp, 257.
(20) (1827) 1 Macq. H. L. Pr. 642.
(21) (1872) L. R. 2 P. & M. 420.

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June 4. The following written judgment was delivered by

Sir F. H. Jeune, President. In this case the petitioner seeks to have his marriage with the respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her. I find that these allegations of fact were proved. It was also stated that the connection of the respondent with the father of her child was incestuous. The proof of this was not made complete. I do not know whether it could have been; but the allegation was admitted to be immaterial for the purposes of the present case. Had the connection been with a relative, within the forbidden degrees, of the petitioner, there is high authority for saying that the marriage would have been incestuous and void.

On these facts, the argument before me was that there was fraud by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. It would perhaps be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this Court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent. The absence of English authority was, indeed, almost, if not quite, admitted on behalf of the petitioner, and the argument in his favour was mainly based on the reasoning in decisions of some of the American Courts. But the case was argued by Mr. Deane with so much earnestness and ability that I feel bound to state my view of the English authorities to which he referred, and to indicate the difference, as I conceive it to exist, between the law as understood in England and that laid down in other countries, and especially in certain States of America on the point in question.

In the case of *Swift* v. *Kelly* (1), decided in 1835, the Judicial Committee of the Privy Council, Lord Brougham, Baron Parke, and Shadwell V.-C. being members of the Board, expressed its opinion in the following terms: "It should seem, indeed, to be the general law of all countries, as it certainly is

(1) 3 Knapp, 257, at p. 293.

of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made." It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words, unqualified as they are, do represent with substantial accuracy the law of England. While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its distinctive character in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a religious vow—*Turner* v. *Meyers* (1)—referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil contract: *Miles* v. *Chilton*. (2) Lord Hannen said: "Very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a status arising out of a contract": *Sottomayer* v. *De Barros*. (3) The late President, Sir Charles Butt, said, in the case of *Andrews* v. *Ross* (4), that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law." It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it. Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has

(1) 1 Hagg. Cons. 414.
(2) 1 Rob. 684, 694.
(3) 5 P. D. 94, 101.
(4) 14 P. D. 15.

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consented to it to rescind it. Incapacity to consent arising from mental weakness is a fatal objection, not only if urged by or on behalf of the person unable to consent, but if put forward by the capable party to the contract: see *Hunter* v. *Edney* (1); *Durham* v. *Durham*. (2) Again, if both parties to the contract knowingly and wilfully marry without compliance with the law as to publication of banns, either can have the marriage declared null—*Andrews* v. *Ross* (3)—a state of the law which drew from the late President the observation above quoted. I do not mean that, regarding marriage as a contract, explanations more or less far-fetched might not be given of these peculiarities, in order to force the law of marriage into line with the law of ordinary civil contract; but English Courts have not resorted to these expedients, and, while not taking a pedantic objection to the use of the term contract as applied to marriage, they have been content to recognise characteristic peculiarities in the nature and incidents of the marriage contract.

The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnisation, so far as the law deems it essential. There must not be incapacity in the parties to marry either as respects age or physical capability or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.) renders the marriage void or voidable. It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (*Fulwood's Case* (4)) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a

(1) 10 P. D. 93.
(2) 10 P. D. 80.
(3) 14 P. D. 15.
(4) (1638) Cro. Car. 482, 488, 493.

marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in *Rex* v. *Burton-on-Trent* (1) of a man assuming a name to conceal himself from the person to whom he is to be married. In *Portsmouth* v. *Portsmouth* (2) and *Harrod* v. *Harrod* (3) the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract, which (to use the phrase of Wood V.-C. in the latter case) he or she did not understand. *Browning* v. *Reane* (4) and *Wilkinson* v. *Wilkinson* (5) are other cases of the same kind. In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested by Lord Campbell in *Reg.* v. *Millis* (6) of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is consent no fraud inducing that consent is material. Lord Stowell has at least three times expressed this in the most emphatic language. In *Wakefield* v. *Mackay* (7) that learned judge said: "Error about the family or fortune of the individual though procured by disingenuous representations does not at all affect the validity of the marriage"; in *Ewing* v. *Wheatley* (8): "It is perfectly established that no disparity of fortune or mistake as to the qualities of the person will impeach the vinculum of marriage"; and in *Sullivan* v. *Sullivan* (9): "The strongest case you could establish of the most deliberate plot, leading to a marriage the most

(1) 3 M. & S. 537.
(2) 1 Hagg. Ecc. 355.
(3) (1854) 1 K. & J. 4.
(4) (1812) 2 Phillim. 69.
(5) (1845) 4 N. of C. 295.
(6) (1844) 10 Cl. & F. 534, 785.
(7) 1 Phillim. 134, n., 137.
(8) 2 Hagg. Cons. 175, 183.
(9) 2 Hagg. Cons. 238, at p. 248.

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unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains which, though forged by others, he had riveted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced."

The only authorities which were, before me, referred to as in any degree inconsistent with these views are the case of Miss Turner's Marriage Act, and a dictum of the late President in *Scott* v. *Sebright*. (1) Neither of these deals with such facts as are relied on in the present case, and they can be put forward at most as sanctioning a somewhat wider application of the doctrine of fraud as a ground for annulling marriage than the above authorities indicate. In the case of Miss Turner the marriage was annulled by Act of Parliament. It is not possible to say exactly on what ground the votes of the legislators were given ; but it is suggested that the marriage was brought about, as indeed it was, by conduct into which fraud largely entered. It might be sufficient to say of this decision that, as was pointed out in *Templeton* v. *Tyree* (2), it was an Act of the Legislature, not necessarily, therefore, proceeding on the principles of the Ecclesiastical Courts which, in nullity cases, are the guide of this tribunal. It is also to be remarked that, in fact, the case was never brought before the Ecclesiastical Court, though, no doubt, the omission to do so was explained by Lord Eldon in the House of Lords and Mr. Peel in the House of Commons to have been caused by the impossibility of placing the evidence of Miss Turner, as a party, before the Ecclesiastical Courts. (3) But a stronger observation, I think, is that duress is distinctly alleged in the petition (4), and that the evidence in the case clearly proved that not only by fraudulent misrepresentations of fact but by duress of threats, such apparent consent as was given was extorted from the victim of this treatment. In *Scott* v. *Sebright* (5) the late President said : "The Courts of law have always refused to recognise as binding contracts to which the consent of either party has been obtained by fraud or duress,

(1) 12 P. D. 21.
(2) L. R. 2 P. & M. 420.
(3) 17 Hansard (2nd Series), 787, 1134.
(4) 59 Lords' Journ. 308.
(5) 12 P. D. 21, 23.

and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the Court, which shewed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that in the case of marriage, as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

The principles thus long and uniformly asserted by the English Courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shewn that authority to the contrary could be found in the Canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the Canon law. I do not propose to enter into any detailed examination of the Canon law on this subject, and I am well aware that the question has been considered not to be free from doubt, but my own opinion is that the Canon law clearly refuses to allow a marriage to be declared null on the ground of previous unchastity of the wife, and goes far to declare that the only fraud which vitiates marriage is that which goes to the consent. I will quote only one authority, but that a high one. Ayliffe in his Parergon, p. 361, says: "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void ipso jure; . . . . for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences . . . . I have just now observ'd that the principal thing required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. And tho' there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore I shall here consider what kind of error

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it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void ab initio. Now there are four species of error, which are hereunto referr'd. The first is stiled error personæ, as when I have thoughts of marrying Ursula; yet by my mistake of the person I have marry'd Isabella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. For deceit is oftentimes wont to intervene in this case; which ought not to be of any advantage to the person deceiving another. A second species is stiled an error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman and so vice versa; for by the canon law such an error is an impediment to a matrimonial contract. But as there is now no such thing among Christians as persons that are truly bondmen or bondwomen (this kind of bondage or servitude being now abolish'd among us by the advantage of the Christian religion) I shall not long insist on this head. But if a freedman marry'd a bondwoman, knowing her to be such, the Church did not dissolve such a marriage. And thus we read that the marriage between Abraham and Agar the handmaid was a true and valid marriage. The third species is what we call error fortunæ; and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But 'tis otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousands pounds, and the condition is not made good. The last species is stiled an error of quality—viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflower'd or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deem'd to be

simply voluntary as to the nature and substance of it, though in respect of the accidents 'tis not voluntary."

While the above is, as I believe, the correct view of the English law, there is no doubt, not only that the law of other countries is not the same on the point in question, but also that in America the difference has been arrived at by arguments which proceed on principles common to the American law with ours. It is not, of course, necessary to examine in any detail the positive enactments of any other country, nor the law of any country whose system of jurisprudence is not the same as our own. The law of the Civil Code of France, the German Protestant Ecclesiastical law, the Prussian, Austrian, and Italian Codes will be found collected in Fraser on Husband and Wife According To The Law Of Scotland, vol. i. p. 453. It is, however, curious to observe how the tribunals of some of these countries have deduced from the principle of nullity of marriage on account of error in the person (which English law treats only as a question of identity) the conclusion that concealed pregnancy, or even loss of virginity, vitiate marriage. Thus, a French Court, applying the language of the Code *erreur dans la personne* to the case of *erreur sur la personne morale* has held a marriage void on account of concealed pregnancy, a view rejected by the commission which prepared the Italian Code; and a Prussian tribunal appears by a similar interpretation of similar (perhaps somewhat wider) words in their Code to have included the case of unchastity. There is a remarkable decision on the Roman-Dutch law in the Supreme Court of the Cape of Good Hope: *Horak* v. *Horak*. (1) The facts there were the same as those in the present case, and the Court held the marriage void, following, it would seem, the authority of Voet against what Voet admits to be the authority, though he disputes the reasoning, of the Canon law. I will only point out that the learned judges feel compelled to repudiate the length to which Voet carries his argument—namely, the annulment of marriage on the ground of unchastity alone, and the language of their judgment recognises what difficult questions their decision raises and leaves for future solution. Although, however, the

(1) (1861) 3 Searle, 389.

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question of annulment of marriage by reason of concealed unchastity has been discussed by Scotch text-writers, one authority only, Bankton, appears to have given in his adhesion to the doctrine of Voet as regards ante-nuptial incontinence in a wife, but he courageously overcomes the difficulty of parity between the sexes by remarking: "A breach of chastity in a man before marriage is not so heinous or scandalous as in a woman; nor is there a presumption that the woman would have refused the man on that ground, though she had known it." Lord Stair, on the other hand, has laid down: "If one married Sempronia supposing her to be a virgin rich or well natured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials, the contract is valid" (see Fraser, vol. i. p. 451). There is no decision, as far as I am aware, of any Scottish tribunal annulling a marriage on the ground either of concealed unchastity or concealed pregnancy, nor has any distinction between the two ever been suggested.

The decisions in the American Courts on which the learned counsel for the petitioner places his main reliance do no doubt cover the present case, and the more important of them are, I think, decisions professing to be based on the same principles that we recognise. Speaking with all respect, these Courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage; but they lay down that there is one fraudulent representation, or fraudulent concealment, which renders a marriage void, and that is the representation or concealment by which a woman induces one man to marry her when she is pregnant by another. The leading decision to this effect was given by the Supreme Court of Massachusetts in 1862: *Reynolds* v. *Reynolds* (1)—a case decided on demurrer. It is not quite clear whether the Chief Justice, by whom the case was decided, conceived himself to be

(1) 85 Mass. (3 Allen) 605.

deciding according to the principle of the Ecclesiastical law of England, because he was acting under a statute of the State (Stat. 1855, c. 27, re-enacted by Gen. Stats. c. 107, s. 4), which authorized a decree of nullity "when a marriage is supposed to be void or the validity thereof is doubted either for fraud or any legal cause," and he stated that "this statute was founded on the assumption that a marriage into which one of the parties was induced to enter through the fraud and deception of the other is null and void, and, like other contracts, may be annulled and set aside by the defrauded party." The learned and eminent American text-writer, Mr. Bishop, however, considers that this statute was "merely jurisdictional" (Bishop on Marriage, ed. 1891, vol. i. § 485), and I think, therefore, that it may be assumed that this enactment was not considered to enlarge the law.

The argument of the Chief Justice, as I understand it, is that fraud vitiates a marriage just as it does other contracts, but that the fraud must be "in the essentialia of the marriage relation," and that the fraud of a woman in concealing her pregnancy by a man other than her intended husband at the time of her marriage is such a fraud. It is, he considered, a fraud in the essentialia of marriage for two reasons—first, because a child may be born which, according to the presumption of law, will be the husband's, though not really his; and, secondly, because the woman, at the time of marriage, is incapable of bearing a child to her husband. The departure, as I venture respectfully to think, from the law of England consists not only in unduly extending the analogy between the law of marriage and the law of other contracts, but more especially in declaring a circumstance to be of the essence of marriage which the English law does not so hold. According to English law, as I have above said, the only material circumstance by operating on which fraud vitiates a marriage is the reality of consent. The law of Massachusetts appears to me to add another—not, indeed, the want of chastity in the wife, but such want of chastity as results in pregnancy at the time of the marriage. But are the grounds upon which this circumstance is singled out sufficient? The most effective

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criticism of them appears to me to be supplied by the writer, Mr. Bishop, whom I have above mentioned. He analyzes the judgment in *Reynolds* v. *Reynolds* (1) with great minuteness, and with regard to both the points above mentioned he gives what appear to me to be conclusive answers. He points out, as to the presumption of paternity, that a man who has evidence to prove the marriage void can prove the child not to be his. It may be added that the birth of the child after marriage makes but little difference, according to English law, in the pecuniary liability of the husband, as the statute 4 & 5 Will. 4, c. 76, s. 57, throws on him, at least during his wife's life, the maintenance of her illegitimate children whenever born. As to the incapacity of the woman at the time to become pregnant by her husband, he replies that such incapacity (unlike the sexual incapacity for which the Courts annul marriages) is temporary only; and I think it might be added that incapacity to bear children, even if permanent, has never in our law been considered a ground for annulling a marriage. He is of opinion, therefore, that the reasoning, when looked at in all its parts, is unsatisfactory. In this opinion I respectfully agree. It appears to me impossible to say that it is immaterial that a wife has been unchaste and immaterial that she has become pregnant by that unchastity, but it is material if such pregnancy continues till the marriage. I could understand a broad principle that unchastity before marriage should vitiate the contract, as some legislatures have, I believe, enacted that it shall, on the ground that a man believes he is making a pure woman his wife. But that is assuredly not the law of England, and, unless there is to be one law for a man and another for a woman, it is impossible to suppose it ever could be. But I do not understand why the accidental circumstances—first, of misconduct resulting in pregnancy, and, secondly, of that pregnancy continuing to the marriage—should constitute the momentous difference between a valid and invalid marriage. I think I ought, in fairness, to add that, although Mr. Bishop disapproves the judgment of the Court of Massachusetts when looked at in

(1) 85 Mass. (3 Allen), 605.

its parts, he nevertheless approves of it as a whole. "Though the reasoning," he says (§ 494), "when thus examined, step by step, seems inadequate, few in our American profession will reject its conclusion. The true view plainly is that here is a cord of several strands, no one of which has strength enough to sustain the heavy consequence when put upon it alone. But duly combined they do sustain it. This effect of combination pervades equally the law of nature and the law of the land. In the latter it is frequently manifest, for example, in conspiracy, both civil and criminal, and it appears in every part of the law where there is occasion for its presence." I will only say that metaphor and analogy in legal reasoning are apt to be dangerous guides.

The above decision was followed, though under special statutes, in the cases of *Morris* v. *Morris* (1), *Ritter* v. *Ritter* (2), and *Carris* v. *Carris*. (3) Some of the American Courts have, however, felt bound to limit the application of the principle that concealed pregnancy at the time of marriage vitiates it. In *Scroggins* v. *Scroggins* (4) the husband would not swear that he believed his wife chaste at the time of the marriage. Both parties were white. After marriage a mulatto child was born. The marriage was, however, held to be valid on the ground, it would appear, that the husband should have detected his wife's condition. In a later case, *Scott* v. *Shufeldt* (5), it appears to have been suggested as the reason for this decision that the woman could not be proved to have deceived her husband, as she might not, at the time of marriage, have known whether he or the negro were the father. In *Crehore* v. *Crehore* (6) and in *Foss* v. *Foss* (7) the wife was pregnant at marriage by a man other than her husband; but the husband had been guilty of ante-nuptial incontinence with her, and it was held that he was "put on his guard" or "put on inquiry," and so a decree in his favour was refused. On the other hand, in a case in California—*Baker* v. *Baker* (8)—it would appear that

(1) Wright, 630.
(2) (1839) 5 Blackford, 81.
(3) 9 C. E. Green, 516.
(4) 3 Dev. 535.
(5) (1835) 5 Paige, 43.
(6) 97 Mass. (1 Browne) 330.
(7) 94 Mass. (12 Allen) 26.
(8) 13 Cal. 87.

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the decision in *Scroggins* v. *Scroggins* (1) was disapproved of. I refer to these cases chiefly to shew that it has been felt that even the comparatively narrow principle that a marriage is voidable by pregnancy of the wife at the time of it by a man other than her husband must receive still further limitations. I venture to think that such limitations could not stop at the point indicated by the above decisions. What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of legitimate children, as well might happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage or the child died? Could he many years after annul the marriage? It is difficult to see why not, if he had no means previously of discovering the truth. Could he bastardize his children? It is also difficult to see why not, unless some further refinement be introduced into the law. My belief is that to assent to the proposition for which the petitioner contends would be to introduce into a law which now is, and beyond question should be, and he believed to be, certain, a new principle not resting on any sound basis, and, develop as it must in several directions, sure to give rise to many doubts and much confusion. To shew that this apprehension is not visionary, I venture to quote the experience of the American text-writer to whom I have already referred, expressed in the last edition of his work (Bishop, vol. i. § 452). Speaking of the subject of fraud in relation to marriage, he writes: "Such judicial utterances upon it as we have are largely conflicting, and otherwise muddled. So that, should an author discussing it present all the views, and those only, which have occurred to the judges and found embodiment in their utterances, he would lead his readers into a labyrinth of contradictory and chaotic things, out of which the practitioner could not readily discover a path." I hope that I may be pardoned for declining to take a step which, apparently, leads to such consequences. I have to express my acknowledgments to the learned counsel on both sides for the great aid which their researches have afforded to me. I am sorry for the

(1) 3 Dev. 535.

undeserved misfortune of the petitioner, but the petition must be dismissed.

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Petition dismissed.

Solicitors for petitioner: *Gedge, Kirby & Millett.*

Solicitor for Queen's Proctor: *Solicitor to the Treasury.*

W. J. B.

[DIVISIONAL COURT.]

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March 23; *April* 8; *July* 8.

*Admiralty—County Court—Practice—Action in rem—Freight—Counter-claim for Wrongful Arrest—Trial by Jury—*32 *&* 33 *Vict. c.* 51, *s.* 2, *sub-s.* 1—51 *&* 52 *Vict. c.* 43, *s.* 101.

In a proceeding in rem in a county court, under s. 2, sub-s. 1, of the County Courts Admiralty Jurisdiction Amendment Act, 1869, by a shipowner against cargo owners, for balance of freight, the defendants counter-claimed, under the same sub-section, for 100*l.* damages for wrongful arrest of the cargo, and, under s. 101 of the County Courts Act, 1888, required a jury to be summoned for the trial of the action. The judge refused to allow the jury to be sworn. On appeal:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of the county court judge, that, this being an Admiralty cause, the defendants were not entitled as of right to a jury, for the word "actions" in s. 101 of the County Courts Act, 1888, did not include Admiralty actions.

Appeal by defendants from a refusal of the judge of the Hampshire County Court to allow a jury to be sworn to try an Admiralty action for balance of freight and counter-claim for wrongful arrest of cargo.

The material facts were shortly that:—

By charterparty, dated Rotterdam, January 21, 1897, it was agreed between the plaintiff, Jos. de Poorter, owner of the steamship *Theodora*, and the charterer's agents, that the vessel should load there a cargo of moss litter to be delivered at Portsmouth on payment by the consignee of the freight in cash, the master to have a lien on the cargo for the freight, and the ship

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to be addressed at the port of discharge to charterer's agents paying usual fee.

By bill of lading, dated February 5, 2152 bales of moss litter were shipped by the defendants, Thurms Moss Litter Company of Newcastle, to be delivered to H. W. Richards or assigns, he or they paying freight, and other conditions as per charterparty.

The vessel arrived at Portsmouth on February 7, and the next day the defendants sent Richards a cheque for 127*l.* 7*s.* 4*d.* to cover the freight. On February 9 Richards sent to the plaintiff at Rotterdam a cheque for 113*l.* 10*s.*, being the freight less port charges and agency fee, and also deducting 5*l.* 14*s.* 4*d.*, made up of 3*l.* 19*s.* damage to seventy-nine bales, and 1*l.* 15*s.* 4*d.* extra labour in discharging cargo. On the same day the vessel finished discharging, and, before sailing, the master of the *Theodora* gave C. G. German, a shipbroker of Portsmouth, a written authority to collect and receive the freight, and the plaintiff, after the receipt of the cheque for 113*l.* 10*s.*, telegraphed to German not to deliver the cargo unless the 5*l.* 14*s.* 4*d.* was paid. On the following day C. G. German, on behalf of the plaintiff, arrested the cargo as it lay on the quay, in an action in rem under s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (1), and under s. 5 of the same Act (1), the plaintiff requested that the judge might be assisted by two mercantile assessors, but there were no such assessors attached to the court. The defendants, as owners of the cargo, arranged for its release by paying 5*l.* 14*s.* 4*d.* into court, together with a sum to cover costs, and, as they contended, on the correspondence between the parties, that Richards was the duly authorized agent of the plaintiff to receive the freight, and, therefore, that the arrest of the cargo was wrongful, they counter-claimed under the same sub-s. 1 of s. 2 (1) for 100*l.* damages for illegal arrest. They also gave the county court registrar notice, under s. 101 of the County Courts Act, 1888 (2),

(1) See these sections, set out in the judgment of Gorell Barnes J.

(2) 51 & 52 Vict. c. 43: "Sect. 101. In all actions where the amount claimed shall exceed five pounds, it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action, unless

and Order XXII., r. 1, of the County Court Rules, 1889 (1), that they required a jury to be summoned. At the hearing, however, on objection taken by the plaintiff, the learned county court judge refused to allow the jury to be sworn on the ground that, being an Admiralty cause, the defendants were not entitled as of right to a jury in respect of the trial of the claim or the counter-claim.

On appeal :—

March 23. *Boyd, Q.C.*, and *Newbolt*, for the appellants (defendants), the owners of the cargo.

Kilburn, for the respondent (plaintiff), the owner of the *Theodora*. (2)

[The arguments of counsel fully appear from the judgments. In addition to the cases therein mentioned, the following were

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the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice; and in all actions where the amount claimed shall not exceed five pounds it shall be lawful for the judge in his discretion, on the application of either of the parties, to order that such action be tried by a jury; and in every case such jury shall be summoned according to the provisions in this Act contained: The party requiring a jury to be summoned shall give to the registrar of the court, or leave at his office, such notice thereof as shall be prescribed; and the said registrar shall cause notice of such demand of a jury, made either by the plaintiff or defendant, to be communicated to the other party to the said action, either by post or by causing the same to be delivered at his usual place of abode or business, but it shall not be necessary for either party to prove on the trial that such notice was communicated to the other party by the registrar. Every party requiring a jury to be summoned shall, at the time of giving the said notice, and before he shall be entitled to have such jury summoned, pay to the registrar of the court the sum of five shillings for payment of the jury, and such sum shall be considered as costs in the action, unless otherwise ordered by the judge . . . ."

(1) Order XXII., r. 1: "Notice of demand for a jury shall be made in writing to the registrar five clear days before the return day, and the summonses to the intended jurors shall be delivered to the bailiff forthwith."

(2) A preliminary objection taken by counsel for the respondent—that the appeal would not lie as the special provisions of s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, had not been complied with as to leave and security for costs, in the case of appeals from interlocutory orders—was overruled by the Divisional Court.

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referred to: *The Cashmere* (1); *Gilson* v. *Kilner* (2); *The Alert* (3); *Tenant* v. *Ellis* (4); *Rockett* v. *Clippingdale* (5); *The Evangelismos* (6); *The Walter D. Wallet* (7); *The Temple Bar*. (8)]

Cur. adv. vult.

April 8. THE PRESIDENT (SIR F. H. JEUNE). I have had the advantage of reading the judgment prepared by my learned brother, and I agree in its conclusion; but as the matter is one of practical importance, I think it well to state shortly the reasons which determine my decision.

The question is whether, under s. 101 of the County Courts Act, 1888, the plaintiff or defendant can claim to have the action tried by a jury when the proceeding is one in which jurisdiction is given by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869, and the subject-matter is not salvage, towage, or collision. To my mind the question resolves into this—whether the Act of 1888 gave that right for the first time.

I entertain no doubt that under the County Courts Admiralty Jurisdiction Act, 1868, no right to a jury was conferred. In *The Tynwald* (9) my learned brother, Bruce J., so held, on the ground mainly that the words "ordinary civil causes" in s. 10 imported a reference to the mode of trial alone common to such causes—namely, that before a judge. I do not wish to challenge this view, but my opinion is based rather on observing that the Act of 1868 gives an appeal on fact, which is inconsistent with jury procedure, and provides for transfer of causes, when convenient, to the High Court of Admiralty.

Then came the Act of 1869. It may, I think, be assumed that this Act gave to the county courts an Admiralty jurisdiction over matters previously within the cognizance of the courts of common law, and I feel the force of the argument that to hold that there is no right to a jury in trials under this Act is to suppose that the Legislature withdrew the right to a

(1) (1890) 15 P. D. 121.
(2) (1893) 69 L. T. 310.
(3) (1894) 7 Asp. M. L. C. 544.
(4) (1880) 6 Q. B. D. 46.
(5) [1891] 2 Q. B. 293.
(6) (1858) Sw. 378.
(7) [1893] P. 202.
(8) (1885) 11 P. D. 6.
(9) [1895] P. 142.

jury from cases in which it previously existed. But if the Act of 1868 did not give a right to a jury, there is no language in the Act of 1869 which conferred that right. On the contrary, the provision as to assessors, though it does not, as does s. 10 in the Act of 1868, give a right to assessors, and, therefore, does not lead so conclusively to an inference as that section, still appears to me to point to trial before a judge as the recognized mode of trial.

I think it would be a strong confirmation of this view if the decision in *Simpson* v. *Blues* (1) and *Gunnestad* v. *Price* (2), to the effect that these Acts do no more than give to the county courts a portion of the jurisdiction of the High Court of Admiralty, could properly be preferred to those of the Privy Council in *Cargo ex Argos*, *The Hewsons* (3), and of the Court of Appeal in *The Alina* (4), and the Admiralty Court in *The Rona* (5), because it would seem impossible to suppose that in merely giving a portion of the jurisdiction of the High Court of Admiralty to the county courts it was intended, without any express words to that effect, to set up a totally different mode of trial for that portion. This question, however, cannot, I think, now be considered open, and no such argument can be relied on. But it is to be observed that in *The Alina* (4) the late Master of the Rolls (6), while holding that the county courts had obtained a wider jurisdiction than the High Court of Admiralty, assumed that in the county court trials would be before a judge without a jury. "The only suggestion we have heard," the learned judge said, "is that the plaintiff might not get a jury or the defendant might not, but the answer was very simple. It does not follow that that was considered an evil by the Legislature. We know perfectly well that by the comparatively recent Judicature Act, that very option is given to a plaintiff of going to a Division where there is no jury, instead of to a Division where there is a jury."

Did the Act of 1888 (s. 101), reproducing the language of the Act of 1846 (s. 70), include actions on the Admiralty side of

(1) (1872) L. R. 7 C. P. 290.
(2) (1875) L. R. 10 Ex. 65.
(3) (1872) L. R. 5 P. C. 134.
(4) (1880) 5 Ex. D. 227.
(5) (1882) 7 P. D. 247.
(6) 5 Ex. D. 227, at p. 234.

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the county courts? In *The Tynwald* (1) I expressed my opinion that it did not include causes of collision, salvage, and towage. It seemed to me impossible to suppose that it was intended by the general words employed to repeal the right to nautical assessors, which was the well-established mode of trying such causes. If this view be correct the absolute universality of the language of s. 101 cannot be insisted on. I cannot, however, conceal from myself that the causes of collision, salvage, and towage stand on a different footing from the other causes in which jurisdiction was given by the Acts of 1868 and 1869. There are no words in the Acts which seem so distinctly to exclude trial by jury in their case as to render a repeal of such words by general language improbable, and there is nothing in their nature unfitted for trial by jury. But, on the whole, though not without some hesitation, I have come to the conclusion that, having regard to the subject-matter and the context, as the interpretation clause directs, the word "actions" in s. 101 of the Act of 1888 should be understood not to include Admiralty actions. When it was a question of the local limits of the jurisdiction as in *The Hero* (2), or of appeal as in *The Eden* (3) or *The Delano* (4), there was no reason why what applied to common law or Chancery proceedings should not also apply to those in Admiralty. But mode of trial appears to me to be in a different position. If I am right in thinking that from 1868 to 1888 it was intended that Admiralty actions in the county court should be tried in the same way as Admiralty actions in the High Court, it seems to me highly improbable that by the use of general language in the Act of 1888 it was intended to effect a complete change in this respect. This view, I think, receives strong support from the consideration that, as was held by the Court of Appeal in *The Delano* (4) with regard to all Admiralty causes, and as the provisions of the Act of 1888, s. 125, as to assessors in appeals in the High Court shew, at any rate with regard to some Admiralty causes, the appeal on fact given by the Act of 1868 remains a provision inconsistent with trial by jury.

(1) [1895] P. 142.
(2) [1891] P. 294.
(3) [1892] P. 67.
(4) [1895] P. 40.

For these reasons I think that this appeal must be dismissed.

GORELL BARNES J. In this case the defendants, the cargo owners, contend that, although the action is brought in rem under the Act of 1869, yet that by virtue of s. 101 of the County Courts Act, 1888, they are entitled to require a jury to be summoned to try the case. On the other hand, the plaintiff contends that the defendants have no such right, and that the case must be heard by the judge alone, or by the judge sitting with assessors if required. The plaintiff desired to have the judge assisted by mercantile assessors, but was informed by the registrar that there were no such assessors attached to the court, and, as no request was made to have assessors appointed, the question for determination resolves itself into this: Are the defendants entitled to have the case tried by a judge and jury, or is the judge to hear it alone?

To answer this question it is necessary to review the Acts which bear upon the subject.

The County Courts Admiralty Jurisdiction Act, 1868, conferred Admiralty jurisdiction on county courts. Sect. 2 gave power to her Majesty in Council to appoint county courts to have Admiralty jurisdiction. Sect. 3 provided that "any county court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of the Act," certain causes (in the Act referred to as Admiralty causes)—namely, causes of salvage, towage, necessaries, wages, and damage to cargo, or damage by collision, within certain limits as to amount, and causes of the same kind as aforesaid where the said limits are exceeded, where the parties agree to the Court having jurisdiction. (There is now a further limit as to suits for wages by s. 165 of the Merchant Shipping Act, 1894.) Sects. 6, 7, and 8 contain provisions for transfer of causes to the High Court of Admiralty or to another county court. Sects. 10, 11, and 13 are as follows:—

"10. In an Admiralty cause in a county court the cause shall be heard and determined in like manner as ordinary civil

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causes are now heard and determined in county courts, save and except that in any Admiralty cause of salvage, towage, or collision the county court judge shall, if he think fit, or on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors.

"11. In any such Admiralty cause as last aforesaid it shall be lawful for the judge of the county court, if he think fit, and he shall, upon request of either party, summon to his assistance in such manner as general orders shall direct, two nautical assessors, and such nautical assessors shall attend and assist accordingly."

"13. The judge of every county court having Admiralty jurisdiction shall hear and determine Admiralty causes at the usual courts held within his jurisdiction, or at special courts to be held by him, and which he is hereby required to hold as soon as may be after he shall have had notice of an Admiralty cause having arisen within the jurisdiction of his court."

Sect. 26 provides for appeals to the High Court of Admiralty from decrees or orders of county courts in Admiralty causes, and s. 31 limits the right of appeal to cases where the amount decreed or ordered to be due exceeds 50*l*. Sect. 34 provides that the Act shall be read as one Act with so much of the County Courts Act, 1846, and the Acts amending or extending the same, as was then in force. Sects. 35 and 36 contain provisions for the making of general orders for regulating the practice and procedure of the courts, but the rules now in force appear to have been made under the powers conferred by these sections combined with ss. 164 and 165 of the County Courts Act, 1888. (1) The present rules contain numerous special provisions relating to Admiralty actions. The County Courts Admiralty Jurisdiction Amendment Act, 1869, is by s. 1 to be read and interpreted as one Act with the Act of 1868, and by s. 2 "any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto to try and determine

(1) See Raikes and Kilburn, Admiralty Practice in County Courts, p. 116.

the following causes: (1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship provided the amount claimed does not exceed 300*l.*" (2.) As to any cause in respect of any such claim or claims as aforesaid, but in which the amount claimed exceeds the said limit when the parties agree to the Court having jurisdiction. Sect. 3 provides that the jurisdiction conferred by that Act and by the Act of 1868 may be exercised either by proceedings in rem or by proceedings in personam. Sect. 4 extends the 3rd section of the Act of 1868 to all claims for damage to ships whether by collision or otherwise when the amount claimed does not exceed 300*l.* Sect. 5 provides that "in any Admiralty or maritime cause the judge may, if he think fit, or on the request of either party, be assisted by two mercantile assessors."

The County Courts Act of 1846, by s. 69, enacted that the judge of the county court should be the sole judge in all actions brought in the said court and should determine all questions of fact as well as of law unless a jury should be summoned as thereinafter mentioned; and by s. 70 it was enacted that in all actions where the amount claimed should exceed 5*l.* it should be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action, and in all actions where the amount claimed should not exceed 5*l.* it should be lawful for the judge in his discretion on the application of either of the parties to order that such action be tried by a jury. It never seems to have been contended that these sections affected the mode of trial of Admiralty causes.

The County Courts Act, 1888, which repealed the Act of 1846, by ss. 100 and 101 repeated these provisions as to trial, but excepted actions of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice from the actions in which the parties have a right to a jury. Equity actions appear to be expressly excepted because they are mentioned in Part III. of the Act dealing with jurisdiction and law. They were not included in the Act of 1846, and jurisdiction in such actions was not conferred until 1865, and although it would

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seem that the judge may order a trial by jury in these cases neither party has a right to a jury.

Such being the Acts affecting the question of trial in Admiralty causes in county courts, it was decided by this Court, in the case of *The Tynwald* (1), that in an Admiralty cause of collision in a county court, if one party asks for a jury and the other for assessors, the trial must be by judge and assessors. The President held that the exception in s. 10 of the Act of 1868 enabled either party or the judge, in causes of salvage, towage, or collision, to say that the trial should be by judge and assessors, and that s. 101 of the Act of 1888 was not to be construed to repeal s. 10 of the Act of 1868, and to establish a new rule for the trial of Admiralty causes of salvage, towage, and collision. Bruce J. arrived at the same conclusion, but by different reasoning from that adopted by the President. He held, for reasons given at length by him, that the provision in the first part of s. 10 that an Admiralty cause in a county court shall be heard and determined in like manner as ordinary civil causes were then heard and determined in county courts, meant that they were to be heard and determined by the judge alone, and that s. 101 of the Act of 1888 has no application to Admiralty actions.

The President's judgment would not cover the present case, because the exception in s. 10 is confined to salvage, towage, and collision causes, and it was not necessary to go further than he did; but the reasoning of Bruce J. would apply to the present case. In the main I agree with the views held by him.

The Act of 1868 conferred Admiralty jurisdiction on county courts, and Admiralty jurisdiction was always exercised by the High Court of Admiralty by the judge alone, or the judge assisted by assessors. The two classes of causes left untouched by the exception in the 10th section of the Act of 1868 are causes of necessaries and wages, with regard to which it was argued that the Act has not taken away the parties' common law right to a jury. But it is to be observed that in suits of these two kinds in the Admiralty Division of the High Court there is no right to a jury, although the Court had power, under

(1) [1895] P. 142.

s. 11 of 3 & 4 Vict. c. 65, if it thought fit to do so, to direct a trial by jury of any issue or issues on any question or questions of fact arising in any contested suit. When the ancient jurisdiction of the Admiralty Court to enforce the maritime lien of a seaman for his wages was extended by s. 10 of the Admiralty Court Act of 1861 to claims by the master for his wages and disbursements and to cases of special contract which could only be dealt with previously in courts of law, no right to a jury in the Admiralty Court in these cases was given. Again, when the 6th section of 3 & 4 Vict. c. 65, and the 4th and 5th sections of 24 Vict. c. 10 (the Admiralty Court Act, 1861), gave the Court of Admiralty jurisdiction over claims for necessaries in certain cases, and for the building, equipping, or repairing of any ship where the ship or proceeds thereof are already under arrest, no right to a jury was conferred.

There seems, therefore, no reason for saying that in conferring Admiralty jurisdiction on the county courts the Legislature did not intend causes of necessaries and wages to be determined without a jury.

Further, if any such cause is transferred to the High Court under ss. 6, 7, and 8 of the Act of 1868, it would be tried in the High Court without a jury. Moreover, an appeal is given by the 26th section of the Act of 1868 to the High Court of Admiralty from a decree or order of a county court in an Admiralty cause. This provision is intelligible if the appeal is from a judge's decision, but not if a jury has tried the case, and there is no provision in the Act dealing with such a subject as new trials.

In my opinion, if the whole scope of the Act of 1868 is considered, the intention was to set up inferior Admiralty Courts to deal with certain cases within certain limits as such cases would be dealt with in the High Court of Admiralty; and the only difficulty in arriving at this conclusion, so far as it affects the mode of trial, is created by the first part of s. 10 and the incorporation of the Act of 1846 by s. 34; but this difficulty can be eliminated by adopting the opinion expressed by Bruce J.

The Act of 1888 is "an Act to consolidate and amend the County Courts Acts." Sect. 5 provides that "every court held

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under the Act shall have all the jurisdiction and powers at any time prior to the coming into operation of the Act of 1846 belonging to any county court for the recovery of debts and demands as altered by the Act (that is the Act of 1888) throughout the whole district for which it is held." Part III. of the Act, under the title "jurisdiction and law," contemplates only common law actions and certain jurisdiction in equity. The only reference to an Admiralty action is in s. 125, where provision is made for assessors on the hearing of an appeal. The Acts repealed by the Act of 1888 are all Acts which relate only to the common law, equity, and bankruptcy jurisdiction of the Court. The Acts of 1868 and 1869 are not mentioned. These are strong reasons for holding that the Act of 1888 was not intended to affect proceedings under the Acts of 1868 and 1869; but the judges of this court and of the Court of Appeal have held that some of the sections of the Act of 1888 have, by the generality of their terms, affected the Acts of 1868 and 1869.

In *The Hero* (1), in this Division, it was held that s. 74 of the Act of 1888 extended the provisions of the Act of 1868 as to the mode of commencing proceedings. In *The Eden* (2) the same Court held that s. 120 of the Act of 1888 gave a right of appeal in an Admiralty action upon a point of law, though the amount decreed was under 50*l*. In *The Delano* (3) the Court of Appeal approved of, and followed, the decision in *The Eden* (2), and held also that, in respect of a question of fact, the special provisions of the Act of 1868 are left unaffected. These decisions are binding on this Court, but they do not decide the present question. They shew, however, what difficulties have been produced in the Admiralty procedure under the Acts of 1868 and 1869 by the Act of 1888, and it seems to me it would be very desirable that these difficulties should be dealt with by fresh legislation.

I do not feel that I am forced by these decisions to hold that s. 101 of the Act of 1888 entitles the parties to trial by jury in causes of necessaries and wages under the Act of 1868. As soon as the conclusion is reached that, according to the Act of

(1) [1891] P. 294. (2) [1892] P. 67.

(3) [1895] P. 40.

1868, all the causes mentioned in it are to be tried by a judge alone, except in the three cases where he must have assessors if required, it seems to me to follow that the actions referred to in s. 101 of the Act of 1888 do not include Admiralty actions, because if they do then, in my opinion, they would make a trial by jury compulsory at the request of either party in salvage, towage, and collision causes, as well as in other causes, which the case of *The Tynwald* (1) shews cannot have been intended.

In my opinion the application of the word "actions" in the 101st section of the Act of 1888 to Admiralty causes is repugnant to the subject or context, and, according to the usual rules of construction, it would be erroneous to hold that the special provisions of the Act of 1868, for the trial of Admiralty causes by a judge alone or by a judge assisted by assessors, are to be repealed by a general Act (with which the Act of 1868 is to be read) containing provisions for the trial of actions by a judge and jury.

So far I have dealt with the Act of 1868; but the Act of 1869, under s. 2, sub-s. 1, of which the claim and counter-claim in this case are made, is to be read and interpreted as one with the Act of 1868; and the observations I have made upon the Act of 1868 apply, in my judgment, with equal force to the Act of 1869. The sub-section gives to the county court a somewhat wider jurisdiction in respect of its subject-matter than was possessed by the Admiralty Court, and the claims mentioned in it are of a common law character, but similar considerations to those pointed out above in dealing with the Act of 1868 apply.

In conferring jurisdiction by s. 6 of the Admiralty Court Act, 1861, on the High Court of Admiralty over certain claims for damage to imported cargo, no right to have a trial by jury was given by the Legislature, and there seems no reason to think that it was intended that such a right should remain in respect of the maritime causes mentioned in sub-s. 1 of s. 2 of the Act of 1869. The county court having Admiralty jurisdiction is to have jurisdiction, and all powers and authorities relating

(1) [1895] P. 142.

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thereto, to try and determine these causes. The liability to transfer to, and trial in, the High Court without a jury, and the mode of appeal, are the same as for cases under the Act of 1868, and s. 5 of the Act of 1869 giving power to the judge to have two mercantile assessors is, in my opinion, inconsistent with the notion of a right existing to trial by jury of cases arising under the Acts of 1868 and 1869.

Lastly, some of the County Court Rules specially applicable to Admiralty actions are inconsistent with the trial of such actions taking place before a jury. For instance, Order XXXIX. B, r. 65, empowers the judge in all actions except salvage to order a reference to the registrar or to the registrar and assessors as to the amount for which judgment should be given, and thus appoint that tribunal to discharge one of the special functions of a jury—namely, the assessment of damages. This is in accordance with the ordinary practice of the High Court in Admiralty actions.

Interlocutory appeal on law dismissed; leave to appeal. (1)

The further hearing of the case was proceeded with at Portsmouth before the learned county court judge alone, and he found, on the facts, that the arrest of the cargo was justified, for Richards, in deducting 5*l.* 14*s.* 4*d.* from the freight for alleged damage to cargo, was acting solely as agent of the defendants, and as no damage to the cargo had been proved for which the shipowner was liable, there was a balance of freight due to the plaintiff, and the learned judge, therefore, gave judgment for the plaintiff on the claim and counter-claim with costs.

On appeal:—

July 8. *Carver* and *Newbolt*, for the appellants (defendants). *Kilburn*, for the respondent (plaintiff).

(1) The appeal was not prosecuted.

The Divisional Court affirmed the judgment of the county court judge.

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Appeal on facts dismissed.

Solicitors for appellants (defendants): *Stokes & Stokes, for Harvey & Harvey, Southsea.*

Solicitors for respondent (plaintiff): *Edgar J. Bechervaise, Portsmouth.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.

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July 21.

M. A. SMITH *v.* A. SMITH (I. M. NOWERS, INTERVENER).

Divorce—Application for Rehearing—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 1—*Rules of Divorce Court, rule* 62. (1)

An application for rehearing of a divorce cause tried by a judge without a jury must be made to a Divisional Court of the Probate, Divorce, and Admiralty Division according to rule 62 of the Divorce Rules, and not to the Court of Appeal, the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, applying only to causes or issues tried with a jury.

THIS was a divorce cause which had been tried by Gorell Barnes J. in March, 1897, without a jury. The petitioner now applied for leave to file notice of motion for a rehearing notwithstanding the lapse of time.

Adam Walker, for the application.

(1) Rule 62 of the Rules and Regulations in Divorce and Matrimonial Causes, dated December 26, 1865, as amended in August, 1885, is as follows:—

"An application for a new trial of the issues of fact tried by a jury or for the rehearing of a cause, shall hereafter be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and shall be by notice of motion filed in the registry stating the grounds of the application, &c."

Supreme Court of Judicature Act, 1890, s. 1: "From and after the commencement of this Act every motion for a new trial or to set aside a verdict, finding, or judgment in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein, with a jury, shall be heard and determined by the Court of Appeal, and not by a Divisional Court of the High Court, &c."

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Deane, Q.C., and *Willock*, for the respondent. This application ought not to be made here, but to a Divisional Court of the Probate, Divorce, and Admiralty Division. The Act 53 & 54 Vict. c. 1, which was applied in *Wilkins* v. *Wilkins* (1), refers only to an application for a new trial of a cause tried by a jury, and does not affect this case, which is governed by rule 62 of the Divorce Rules.

Gollan, for the intervener.

LINDLEY L.J. I think it clear, on looking at the Act and the rule, that this application ought to be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and that we have no jurisdiction to entertain it.

LOPES L.J. I also am of opinion that the case is governed by rule 62, and that the application ought to be made to a Divisional Court of the Probate, Divorce, and Admiralty Division.

CHITTY L.J. I agree.

Solicitor for petitioner: *Griffith Williams.*
Solicitor for respondent: *W. P. Neal.*
Solicitors for intervener: *Townsend & Sharpe.*

(1) [1896] P. 108.

H. C. J.

THE CLYMENE.

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July 5, 8, 9.

Admiralty—Compulsory Pilotage—Liability of Owner—Passengers—Distressed Seamen—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 191, 192, 625.

A collision occurred, in Galleons Reach of the River Thames, between the plaintiffs' barge and the defendants' steamship, for which the pilot in charge of the steamship was found solely to blame. The steamship belonged to the port of London, and was, at the time, carrying five distressed British seamen under a conveyance order of a British consular officer at a foreign port pursuant to ss. 191, 192 of the Merchant Shipping Act, 1894, for whom the sum of 3*s.* each per day was paid by the Board of Trade. By s. 625 of the same Act a ship navigating within the limits of the port to which she belongs is exempt from compulsory pilotage in the London district "when not carrying passengers":—

Held, by Gorell Barnes J., that the distressed seamen were not passengers, within the meaning of the section of the statute, so as to make pilotage compulsory, and, therefore, the owners of the steamer were liable for the damage done to the barge.

ACTION of damage by collision.

The plaintiffs were the owners of the barge *Phœbe*; the defendants were the owners of the steamship *Clymene*.

On February 26, 1897, about 6 A.M. the *Phœbe*, a wooden spritsail barge of forty-one tons register with two hands and laden with ninety tons of cement, was heading up Galleons Reach of the River Thames on the port tack to fetch the Albert Dock when she was signalled to by the *Clymene*—a steamship of 895 tons register, a crew of twenty hands, with 1400 tons of general cargo from Leghorn and Genoa to London—to put about and get out of the way, but the barge failing to do so a collision occurred and the barge subsequently sank.

The *Clymene* belonged to the port of London, and at the time of the collision was navigating within the limits of that port, and, if not carrying passengers, would be exempt from compulsory pilotage under s. 625 of the Merchant Shipping Act, 1894. (1) She had on board five distressed British seamen

(1) 57 & 58 Vict. c. 60, s. 625: "The following ships, when not carrying passengers, shall, without prejudice to any general exemption under

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under conveyance orders, as to one distressed seaman of the British consular officer at Leghorn, and as to the other four of the British consular officer at Genoa, pursuant to ss. 191, 192 of the Merchant Shipping Act, 1894. (1) By these orders the

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this part of this Act, be exempted from compulsory pilotage in the London district and in the Trinity House outport districts (that is to say)

. . . .

"(5.) Ships navigating within the limits of the port to which they belong."

(1) 57 & 58 Vict. c. 60, s. 191: "(1.) The following authorities, that is to say, governors of British possessions, British consular officers, and other officers of Her Majesty in foreign countries shall, and, in places where there are no such officers, any two resident British merchants, or if there is only one British merchant so resident that merchant, may in accordance with and on the conditions prescribed by the distressed seamen regulations, provide for the maintenance, until a passage home can be procured, of the following seamen and apprentices (who are in this Act included in the term distressed seamen) namely,—

"(*a*) Seamen and apprentices to the sea service, whether subjects of Her Majesty or not, who by reason of having been discharged or left behind abroad or shipwrecked from any British ship, or any of Her Majesty's ships, are in distress in any place abroad; and,

"(*b*) Seamen and apprentices to the sea service, being subjects of Her Majesty, who have been engaged by any person acting either as principal or agent to serve in a ship belonging to the Government or to a subject or citizen of a foreign country, and are in distress in any place abroad.

"(2.) For the purpose of providing a distressed seaman with a passage home, the authority shall put him on board a British ship bound either to the United Kingdom or to the British possession to which the seaman belongs (as the case requires), which is in want of men to make up its complement; or if there is no such ship, then the authority shall provide the seaman with a passage home as soon as possible in any ship, British or foreign, bound as aforesaid.

"(3.) The authority shall endorse on the agreement with the crew of the ship, if a British ship, on board of which a distressed seaman is placed, the name of every person so placed on board with any particulars directed by the distressed seamen regulations to be endorsed.

"(4.) The authority shall be paid in respect of the expenses of the maintenance and conveyance of distressed seamen such sums as the Board of Trade may allow, and those sums shall, on the production of the bills of disbursements, with the proper vouchers, be paid as hereinafter provided."

Sect. 192: "(1.) The master of every British ship so bound as aforesaid shall receive on board his ship, and afford a passage and maintenance to all distressed seamen whom he is required under this Act to take on board his ship, not exceeding one for every fifty tons burden, and shall during the passage provide every such distressed

master of the *Clymene* was required to receive these seamen on board his vessel and convey them to London, and on arrival and filling up the required forms shewing that these men were supernumeraries over and above the number of the crew with which the vessel left the United Kingdom, the Board of Trade paid to the master a sum equal to 3*s*. per day for each seaman by way of subsistence money.

By par. 8 of the defence the defendants pleaded that "The steamship *Clymene* at the time of the collision was in a district in which pilotage was compulsory by law, and was by compulsion of law at such time in charge of a duly licensed pilot whose orders the master and crew of the *Clymene* were bound to obey and did obey, and if there was any negligence in the navigation of the steamship, which is denied, such negligence was solely that of the pilot."

At the trial on July 5 and 8, 1897, before Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, the pilot in charge of the *Clymene* was found solely to blame for bringing about the collision, by insisting upon the barge keeping out of his way, and not, when he could have done so, keeping the steamer out of the way of the barge. The question whether the pilot was in charge by compulsion of law was reserved.

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seaman with a proper berth or sleeping place, effectually protected against sea and weather.

"(2.) On the production of a certificate, signed by the authority by whose directions any such distressed seaman was received on board, specifying the number and names of the distressed seamen and the time when each of them was received on board, and on a declaration made by the master before a justice of the peace, and verified by the Registrar-General of Shipping and Seamen stating the number of days during which each distressed seaman has received maintenance, and stating the full complement of his crew and the actual number of seamen and apprentices employed on board his ship, and every variation in that number, whilst the distressed seaman received maintenance, the master shall be entitled to be paid, in respect of the maintenance and passage of every seaman or apprentice so conveyed, maintained, and provided for by him, exceeding the number (if any) wanted to make up the complement of his crew, such sum per diem as the Board of Trade allow.

"(3.) If any master of a British ship fails without reasonable cause to comply with this section in the case of any seaman or apprentice, he shall for each offence be liable to a fine not exceeding one hundred pounds."

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July 9. *Pyke, Q.C.*, and *A. E. Nelson*, for the defendants, the owners of the steamship *Clymene*. By s. 625 of the Merchant Shipping Act, 1894, the *Clymene* was compelled to take a pilot as she was carrying passengers. The expression "passenger" is defined in s. 267, for the purpose of Part III. of the Act, as including "any person carried in a ship other than the master and crew, and the owner, his family and servants." This definition includes these distressed seamen, for, the ship having her full complement, they were no part of the crew except under s. 237 for purposes of discipline, and the fact of being nominally on the ship's articles would not make them part of the crew: *The Coriolanus*. (1) In s. 192 of the Act provision is made for payment to the master in respect of the maintenance and "passage" of the distressed seamen. Three shillings a day was paid for each of these seamen, which is considerably more than is required for the actual cost of feeding a seaman on board ship. The owners, therefore, derived a profit, and one of the essentials considered by the Court to be necessary to constitute a passenger, namely, the payment of a fare, was satisfied: *The Lion* (2); *The Hanna* (3); *Hedges* v. *Hooker*. (4)

The fact that the master was bound to take these distressed seamen at a low rate does not prevent their being passengers, for under the Hackney Carriage Act, 1831, s. 35, and subsequent Acts, the carriage owner is bound to take passengers and the fare is limited by law. So under the Railway Regulation Act, 1844, s. 6, now replaced by the Cheap Trains Act, 1883, the companies are bound to provide certain cheap trains for working men, but the working men, who are thus provided for, are passengers. Compulsion does not exclude the idea of a person being a passenger. In the case of emigrants, who are clearly passengers, the law is stringent in respect of the amount of accommodation and the quantity and quality of the food supplied. In the case of an innkeeper it is compulsory on

(1) (1890) 15 P. D. 103.

(2) (1868) L. R. 2 A. & E. 102; (1869) 2 P. C. 525.

(3) (1866) L. R. 1 A. & E. 283.

(4) (1889) 6 Asp. M. L. C. 386, but see the Irish decision in *Reg.* v. *Justices of Dublin*, (1884) 15 Cox, C. C. 379.

him to receive guests whilst there is room in the inn and the guest is willing and able to pay for what he requires. Under s. 689 of the Merchant Shipping Act, 1894, the master of a British ship may be compelled to take an offender and witnesses on board and afford them "a passage and subsistence." These persons would be passengers.

Sir Walter Phillimore, and *Butler Aspinall*, for the plaintiffs, the owners of the barge *Phœbe*. The five distressed seamen were not passengers, within the meaning of the Act, so as to make pilotage compulsory and exonerate the owners of the *Clymene* for the damage occasioned by the pilot's default.

They were not members of the crew or passengers, but a class apart, namely, distressed seamen, in respect of whom there was no freedom of contract with the owners of the *Clymene*, for the shipowners were compelled to convey them at a nominal sum, which cannot in any sense be called passage money.

Pyke, Q.C., in reply.

GORELL BARNES J. The sole question remaining for decision is whether, upon the true construction of the Merchant Shipping Act, 1894, the employment of a pilot was compulsory upon the defendants at the time, and in the place, where the collision occurred.

Under s. 622 of that Act pilotage is compulsory within the London district, but by s. 625, as this vessel was navigating within the limits of the port to which she belonged, she would be exempt "when not carrying passengers." The question, therefore, resolves itself into whether the *Clymene* was carrying passengers. She had on board five distressed seamen, one of whom was being sent home from Leghorn, and four from Genoa, by the British consuls at those places respectively, under the provisions of ss. 190 to 193 of the same Act. These sections impose upon the master of a British ship, subject to restrictions as to number, the obligation to receive distressed seamen on board his ship and afford them a passage and maintenance, such sum by way of payment being allowed to the master for the owners on the arrival of the ship as the Board

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of Trade sanctions. In this case the sum so paid was 3s. per day per man. By sect. 237 of the same Act every seaman or other person whom the master of a ship is so compelled to take on board and convey is, so long as he remains in the ship, deemed to belong to the ship, and to be subject to the same regulations for preserving discipline as if he were a member of, and had signed the agreement with, the crew.

There is no definition of the word "passenger" in the Act except for the special purposes of Part III., and there, by s. 267, the expression "passenger" is to include "any person carried in a ship other than the master and crew, and the owner, his family and servants." It is obvious that this definition has no application to the special class of persons now under consideration, and it leaves the meaning of the word "passenger" in s. 625 to be gathered from the ordinary interpretation applicable according to the occasion on which it is used. In my judgment, according to the ordinary acceptation of the term, which involves the principle of an agreement to carry and a payment of fare, these distressed seamen, whom the shipowner was compelled to take on board, and for whom he was paid what practically amounts to little more than maintenance, were not passengers within the meaning of s. 625. I am, therefore, of opinion that it was not compulsory on the owners of the *Clymene* to take a pilot, so that they, as defendants, cannot be exonerated for the damage occasioned by the pilot's default. I give judgment for the plaintiffs with costs.

Solicitors for plaintiffs, the owners of the barge *Phœbe: J. A. & H. E. Farnfield.*

Solicitors for defendants, the owners of the *Clymene: Lowless & Co.*

T. L. M.

[DIVISIONAL COURT.]

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Aug. 3.

THE THRUNSCOE.

Admiralty—Bill of Lading—Exceptions—"Accidents of the Seas"—Carriage by Steamship—Damage to Cargo by Heat—Proximate Cause.

A cargo of oats and maize was shipped on the defendants' steamship under a bill of lading excepting "accidents of the seas." During the voyage, owing to exceptionally heavy weather, and for the safety of the ship, the ventilators were closed for about a week with the result that the air in the holds nearest the engine-room space became heated and, not being able to escape, a portion of the cargo was damaged:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of the Court below, that the shipowner was not liable, for the contract was for the carriage of goods by a steamship, and the damage was due to the air, heated in the usual course of the voyage of a steamship, being unable to escape from the holds owing to the ventilators being necessarily closed, and, therefore, the severity of the weather was the proximate cause, and the damage covered by the exception.

APPEAL by plaintiffs, Spillers & Bakers, Limited, corn merchants at Cardiff, and consignees of a cargo by the steamship *Thrunscoe*, against a decision of the judge of the Bristol County Court, in an Admiralty action in personam, in favour of the defendants, Bennetts & Co. of Grimsby, owners of the vessel.

The plaintiffs' claim was for 61*l.* 9*s.* 7*d.* damage to a cargo of oats and maize in bulk, shipped on the *Thrunscoe* at Baltimore, for Avonmouth, under bills of lading, of which the plaintiffs were the holders, dated January 16, 1897, and containing the following exceptions: "the act of God, the Queen's enemies, pirates, restraint of princes and rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation of whatever nature or kind."

The *Thrunscoe*, a steamship built in 1896, of 2186 tons net register, and fitted for the carriage of a cargo of grain, left Baltimore on January 19 with the goods in question stowed in the customary manner, and, on getting out to sea, encountered exceptionally heavy weather, during which she shipped large quantities of water over all, obliging the master, for about a

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week, to keep the hatches battened down, and the ventilators plugged and capped. On arrival at Avonmouth on February 7 it was found that the cargo in Nos. 1 and 4 holds was not damaged, but that, low down in the centre of the ship, the portion of the grain nearest to the engine space, was hard and discoloured, the most serious damage being in No. 2 lower hold, near the stokehole bulkhead, in front of the engine and boilers, where the cargo rested against a wooden sheathing or casing about a foot from the bulkhead, with a ventilator on each side. The grain in No. 3 hold nearest to the bulkhead aft of the engine-room was also somewhat damaged, whilst the maize in No. 2 'tweendecks, next a sloping bulkhead over the engine space, was deteriorated, and there was some damage to the oats resting against the bulkhead of the 'thwartship bunker.

The findings of the learned county court judge at the trial on June 10 are set out in the judgment of the President, and were in effect that the ship was seaworthy, the cargo properly stowed, and sufficient ventilators provided to carry off the heat from the bulkheads next the engine-room, but that, owing to the severity of the weather, the ventilators had been necessarily closed for the safety of the ship, and a portion of the cargo in consequence baked. He held that the cause of the damage was the closing of the ventilators, which was the direct result of perils of the sea, and gave judgment for the defendant shipowners.

The plaintiffs appealed on three grounds: first, that the learned county court judge was wrong in holding that the damage to the cargo was caused by an accident of the sea, and therefore within the exceptions contained in the bill of lading; secondly, that the learned judge should have held that the vessel was not seaworthy; and, thirdly, that the cargo was not properly stowed.

T. G. Carver, and *Bailhache*, for the appellants (plaintiffs), the owners of the cargo. The finding is that the grain was roasted by heat; the proximate cause of the damage was, therefore, the heat from the engine-room. This is not covered by the exceptions in the bill of lading. Again, assuming that the

weather was severe, this will not exonerate the shipowner, as he is bound to provide a vessel able to carry the cargo across the Atlantic in bad weather; and, therefore, the judgment should have been that the ship was not seaworthy. If, however, the ship should be deemed reasonably fit to carry the cargo, still the shipowner must take such precautions with regard to ventilation as will prevent the goods being damaged by the heat from the engine and boilers during bad weather. The cargo, therefore, was not properly stowed. The goods ought not to have been placed close up to the bulkheads so as to be deteriorated by the heat: *The Freedom.* (1)

[The cases of *The Xantho* (2) and *Hamilton* v. *Pandorf* (3) were referred to.]

Sir Walter Phillimore and *Kilburn*, for the respondents (defendants), the owners of the *Thrunscoe*. The ship was nearly new, and it is not disputed that she was fitted with every modern requirement for the carriage of grain. No evidence was produced to shew that the hatches were not properly secured, or that the cargo was not stowed, dunnaged, and ventilated in the customary manner.

The damage resulted from two causes: namely, first the air in the ventilating space between the wooden sheathing and the iron bulkhead next the stokehole not being carried off, the portion of the cargo resting against the wooden casing was fried by contact; secondly, the heated air in those parts of the hold which were nearest to the engine-room and boiler space, not being able to escape, a portion of the cargo was baked; but in both cases the necessary closing of the ventilators for the safety of the ship, on account of the exceptional severity of the weather, prevented that free ventilation which would have carried off the imprisoned hot air and kept the cargo cool. Therefore the proximate cause was a peril of the sea within the exceptions.

THE PRESIDENT (SIR F. H. JEUNE). The findings of fact of the learned county court judge are conclusive of this case.

(1) (1871) L. R. 3 P. C. 594. (2) (1887) 12 App. Cas. 503.
(3) (1887) 12 App. Cas. 518.

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He found that the damage "in question was caused by heat proceeding from the bulkheads surrounding the engine and boiler space—that the ship was fit to carry the cargo on this voyage, and that the damage was not the result of improper stowage, but was the result of the closing of the ventilators during the period of seven days in a storm of exceptional severity and duration—that the ship was provided with sufficient ventilators to carry off the heat from the bulkheads, but all the ventilators were necessarily closed during the storm for the safety of the ship." It appears, therefore, that the learned judge has found, and I see no reason to doubt the correctness of his finding, that the ship was seaworthy, that the stowage was proper, and, thirdly, that it was the exceptional severity of the storm which caused the ventilators to be closed.

With regard to the principal damage, namely, that to the cargo in No. 2 hold, it is quite clear that the air which should circulate between the wooden sheathing and the bulkhead, and so prevent the heat of the engines reaching the cargo, was stopped by reason of the ventilators being closed, and that that was due to the necessity imposed by the severity of the storm. Under those circumstances, dealing with that part of the cargo alone, it appears to me that the severity of the weather was a proximate cause of that damage, because the closing of the ventilators was due to that cause.

Then it is said—and that is the only part of the case which does not appear to me to be quite clear upon the findings of the learned judge—that in two other parts of the ship, namely, in the 'thwartship bunker and No. 3 hold, there was direct contact of the grain with the bulkhead, and the bulkhead being heated produced the damage; but the true effect of his finding appears to me to be that these two cases were the same as the other, and that the comparatively little damage which was done in these two cases would not have occurred if the ventilation of the ship could have been kept in normal condition. In that finding I concur.

For these reasons I think the judgment of the learned judge is right.

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GORELL BARNES J. It has not been clear to me throughout the argument whether this was an appeal upon fact or upon law, but, assuming it to be upon both grounds, the first question is whether the findings of the learned judge upon the facts are wrong.

Now, those findings are set out in the record, and the learned President has read them. After looking into the evidence, it seems to me that there is no ground for holding that the learned judge's decision upon the facts is erroneous. I think that it is in accordance with the weight of the evidence, and it results from his findings that the ship was, as a ship, fit to carry the cargo in question, and that there was no improper stowage.

Counsel for the appellants have, however, contended that, assuming the findings of fact to be correct, the damage which occurred in this case is not, as a matter of law, within the exceptions in the bill of lading. The exceptions in the bill of lading include "fire at sea or on shore, accidents from machinery, boilers, steam, or any other accidents of the seas," &c. It is to be borne in mind that the contract is for the carriage of the goods in a steamship, and the exceptions must relate to a contract of carriage by steamship. The learned judge has found, after stating that the ship was fit to carry the cargo, and that the cargo was properly stowed, that the damage was caused by heat proceeding from the bulkheads surrounding the engine and boiler space, and that this damage was the result of closing the ventilators during a period of seven days in a storm of exceptional severity and duration. He has found that the ship was provided with sufficient ventilators to carry off the heat, but that they were necessarily closed for the safety of the ship. The ship being a fit ship, and the cargo being properly stowed, it is difficult to see what more the shipowner could do. The findings mean that in the circumstances the vessel met with such extraordinary weather that the servants of the shipowner were compelled to close the ventilators for a period which nobody could reasonably contemplate, and that that practically prevented the heat, which is generated in the usual course of the voyage of a steamship, from getting away,

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and that therefore the severity of the weather was the direct cause of the damage which occurred.

In my judgment, when once the meaning of these findings is realized, it becomes clear that this damage was the direct result of the accidents of the seas. I therefore agree that this appeal must be dismissed with costs.

Solicitors for appellants (plaintiffs): *Ince, Colt & Ince, for Ingledew & Sons, Cardiff.*

Solicitors for respondents (defendants): *Holman, Birdwood & Co.*

T. L. M.

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Aug 10.

[IN THE COURT OF APPEAL.]

SYKES *v.* SYKES.

Divorce—Restitution of Conjugal Rights—Alimony pendente lite—Answer of Husband — Cross-examination — Registrar — Discretion — Divorce Court Rules, 1865, *rr.* 86, 191—*Practice—Proceedings in Chambers—Evidence—Note of Registrar or Master.*

Upon a petition before the registrar for alimony pendente lite, the wife is not entitled as a matter of course, under rules 86 and 191 of the Divorce Court Rules, 1865, to an order for cross-examination of her husband upon his answer, even though there may be a great discrepancy between the amount of his income as alleged by her in the petition and the amount as stated in his answer.

Whether the husband should be ordered to attend for cross-examination is a matter entirely for the discretion of the registrar, and the Court will not interfere with the exercise of his discretion unless satisfied that he has either proceeded on a wrong principle or has exercised his discretion wrongly.

Where there is no very great discrepancy between the two figures, it is not the practice of the Court to order the attendance of the husband for cross-examination.

Where a wife in her petition for alimony pendente lite put the income of her husband, a baronet, at 70,000*l.* a year, while the husband in his answer put it at 16,600*l.* only, supporting his statement by full and detailed particulars, the registrar, on the hearing of the petition, and the judge on appeal from him, refused an application by the wife for an order on the husband to attend for cross-examination, and allotted the wife 3000*l.* a year as alimony. On appeal to the Court of Appeal:—

Held, that 3000*l.* a year was an adequate allowance for the wife pendente lite, and that as the registrar had properly exercised his discretion in

allotting that sum, the Court would not interfere by ordering the husband to attend for cross-examination as to his means.

On an appeal from an order of a registrar or master the Court will only recognise a note of the registrar or master as evidence of what took place before him, an affidavit by either party being inadmissible.

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APPEAL from Gorell Barnes J.

In this case a wife had presented a petition against her husband, a baronet, for restitution of conjugal rights. Pending the hearing of that petition the wife presented, under rule 81 of the Divorce Court Rules of December 26, 1865, a petition for alimony pendente lite, containing allegations to the effect that her husband's income was upwards of 70,000*l.* a year, consisting of 18,000*l.* a year from investments, 40,000*l.* a year from his family estate in Yorkshire, and 14,000*l.* a year from the sale of yearlings from his racing stud. According to the usual practice, no affidavit had been filed in support of that petition; but the husband filed a long affidavit in answer denying the wife's allegations, and giving full details of his income, appending a balance-sheet furnished by his estate agent shewing his average income from the family estate during the past three years. From this answer it appeared that his income was as follows: From investments, 12,400*l.* a year; from the rents of the family estate, 10,000*l.* to 11,000*l.* a year net, after deducting annuities and interest on charges; while the annual sale of yearlings shewed, on the average, no profit at all, the proceeds of the sales being absorbed by the very large expenses attending the establishment. His total net income, after making various deductions, he placed at 16,600*l.* only.

Upon the alimony petition coming before the registrar in the usual course to fix the amount of alimony pendente lite, the wife asked that the husband might be ordered to attend to be cross-examined upon his answer; but the registrar declined to order his attendance, or to hear any argument, saying that he had read the papers and knew all about the case; that he had made up his mind what to do, and would use his discretion. He thereupon made an order for payment to the wife of 3000*l.* a year.

The wife then appealed to Gorell Barnes J., who refused to

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direct the husband to attend for cross-examination and confirmed the registrar's order.

The wife now appealed from the order of Gorell Barnes J., and asked that the husband might be ordered to attend before the registrar to be cross-examined upon his affidavit. It appeared that the wife had an income of 300*l.* a year of her own, and also an annuity of 500*l.* as pin-money under her marriage settlement, making a total of 800*l.* a year, in addition to the allowance ordered by the registrar.

Bargrave Deane, Q.C., and *Barnard*, for the wife. The objection to the registrar's finding is that the petitioner was never heard, and the case should therefore be remitted in order that the husband may be cross-examined as to the amount of his income, under rules 86 and 191 of the Rules of December 26, 1865. (1)

There is an affidavit by the wife's solicitor as to what took place before the registrar.

[CHITTY L.J. In my opinion, any affidavit as to what took place before the registrar is not admissible. At one time it was the habit in the Chancery Division for a solicitor's clerk to make an affidavit of what took place before the chief clerk, and

(1) The following rules were referred to:—

Rule 86: "The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge Ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon."

Rule 189: "Application for a further and fuller answer to a petition for alimony, heretofore made to the Judge Ordinary on motion in pursuance of rule 86, shall hereafter be made by summons before one of the registrars."

Rule 191: "All applications for an allotment of alimony pending suit, and for an allotment of permanent alimony heretofore made to the Court by motion in pursuance of rules 89 and 91, shall hereafter be referred to one of the registrars at the principal registry, who shall investigate the averments in the petition for alimony, answer, and reply, in the presence of the parties, their proctors, solicitors, or attorneys, and who, if he think fit, shall be at liberty to require the attendance of the husband for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents or to call for affidavits, and shall direct such order to issue as he shall think fit, or refer the application, or any question arising out of it, to the Judge Ordinary for his decision."

it was often shamefully wrong. Sir George Jessel never would look at such an affidavit: what he used to rely upon was a note from the chief clerk.

LINDLEY L.J. We cannot admit the affidavit.]

It is submitted that the registrar is not entitled to take the evidence of one side only and act upon it. Under s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the Court has, in cases of this kind, to act upon the principles and rules prevailing in the Ecclesiastical Courts; and the principle upon which the Ecclesiastical Courts allot alimony to a wife is to fix a certain proportion of the husband's income: *Frankfort* v. *Frankfort* (1); *Brisco* v. *Brisco*. (2)

[LINDLEY L.J. Is it a matter of course to allow the husband to be cross-examined?]

It is not the invariable rule, if the figures given by the wife and the husband of the latter's income are pretty close; but here there is a large discrepancy, and therefore the wife is entitled to ask for an inquiry and to test the figures given by the husband by cross-examination on his affidavit. Where, as here, the husband's income is large, the practice of the Court is to fix a fair proportion without going minutely into figures, as it does where the income is small, as in *Brisco* v. *Brisco* (2); *Edwards* v. *Edwards* (3); and this due proportion cannot be ascertained without a proper inquiry. The wife is entitled to one-fifth of the 70,000*l.* which is the true amount of the husband's income. Unless the actual amount of the income is known it is impossible to do justice to the wife.

Sir Edward Clarke, Q.C., and *J. C. Priestley*, for the husband. The registrar has, in the exercise of his discretion under rule 191, come to the conclusion that 3000*l.* a year is a sufficient allowance to the wife for alimony pendente lite, and his discretion should not be interfered with. No doubt, if the husband's answer to a petition for alimony pendente lite is not sufficiently explicit, the wife can ask for a further and fuller answer; but even then, she is not entitled to an order on the husband to attend for cross-examination unless his answer is

(1) (1845) 4 Notes of Cases, 280. (2) (1816) 2 Hagg. Cons. 199.
(3) (1868) 17 L. T. (N.S.) 584.

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evasive: *Clark* v. *Clark* (1); *Tonge* v. *Tonge*. (2) Here the husband's answer is of the fullest character, giving the particulars of his various sources of income in the greatest possible detail, and there is nothing whatever in the shape of evasion or concealment. Upon the materials before him—the allegations in the petition and the elaborate statements in the answer—the registrar has exercised his judgment under rule 191, and has been confirmed by the judge. Both have come to the conclusion that there is no reason why the husband should submit himself for cross-examination. To hold that, notwithstanding the registrar has exercised his discretion, the husband should submit to cross-examination would be laying down a rule that the wife is entitled, as a matter of course, on an application for alimony pendente lite to subject her husband to cross-examination.

Bargrave Deane, Q.C., in reply.

LINDLEY L.J. This is an appeal from an order made by Gorell Barnes J., refusing to direct the respondent, the husband, to attend to be cross-examined on his affidavit in answer to the petition for alimony pendente lite filed by the petitioner. The affidavit is one that strikes us all as full, fair, and sufficient; that is to say, it is not an evasive affidavit; it is not an affidavit, so far as I can see, which could be usefully supplemented by any further affidavit. [The Lord Justice then referred to the details of the husband's income, as stated in his affidavit, and continued:—]

Now the wife applies for an order that the husband may attend to be cross-examined on this affidavit, and her application is based on rules 86 and 191, which are as follows: [The Lord Justice read them, and continued:—]

Having regard to those rules, it is impossible, I think, to maintain the proposition for a moment that the wife has a right to have her husband cross-examined. Whether an application by her for his cross-examination ought to be acceded to, must depend on the view which the Court, or in the first instance the registrar, may take of the necessity for a further

(1) (1860) 31 L. J. (N.S.) (P. & M.) 32. (2) [1892] P. 51.

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answer by him or for his attendance for cross-examination. It cannot be put so high as that she has a right simply to test his affidavit, nor does Mr. Bargrave Deane put it quite so high as that, because his experience leads him to tell us—and I have no doubt quite accurately—that if there is no very great discrepancy between what the wife alleges and the husband admits, it is not the practice to require further evidence. All that these rules mean is this—that the registrar, in considering whether there ought to be a further and fuller answer, or whether there ought to be an attendance for cross-examination, must make up his own mind whether, in his opinion, justice to either party requires it. If he comes to the conclusion that there is reason to suppose that the answer does not disclose the whole truth, that there is some evasion or trickery, of course he may, in the exercise of his discretion, very properly require a further and fuller answer, or direct attendance for cross-examination. Suppose he comes to the conclusion that nothing is to be gained by a further answer or a cross-examination, what is he to do? Is he necessarily to make an order for a further answer or for cross-examination? I am satisfied that is not the practice. The rules do not require anything so contrary to good sense. The authorities support this view. For example, the case of *Tonge* v. *Tonge* (1) to which Sir Edward Clarke referred us, is important, because there the President first of all in chambers made an order for cross-examination, there being a very considerable discrepancy between what the wife said was the husband's income, and what he said. His income depended really on the earnings of the partnership in which he was a partner. When that matter was brought to the attention of the judge in court, and his attention was directed more closely to it, he came to the conclusion that cross-examination was not necessary at all, and that there was no sufficient ground for exposing the husband to it at the instance of his wife. So here, the registrar has seen the petition and the affidavit: he has looked at not only what is sworn, but at the details of the investments and the balance-sheet which had been prepared, and he comes to the conclusion

(1) [1892] P. 51.

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that justice does not require either a further answer or personal cross-examination; accordingly, he has made an order to that effect. When the matter came before the judge, he took the same view as the registrar; and I do not see any reason why we should differ from them. If it had come before me on these materials alone, I should have done precisely what the registrar has done.

Looking simply at the question raised by this appeal, which is whether we ought, having regard to what we now know, to order that the respondent be cross-examined as to his means, I am of opinion that justice does not require it; and I think that the appeal ought to be dismissed.

LORD LUDLOW L.J. Cross-examination in this case has been refused by the registrar, and that order of the registrar has been subsequently confirmed by the judge, and we are asked to disturb that order. I do not think that we ought to disturb it.

The object of an application for alimony pendente lite is to provide the wife with an income suitable to her position until the suit is heard. I am aware that the usual proportion which is adopted is one-fifth, that being considered to be a suitable allowance; but it has been the practice, when the income of the husband is large, not to regard the question of proportion so much as to fix a sum which appears to be adequate, having regard to the wife's position in life and necessities, and not minutely to go into figures. Now, here the wife petitions for alimony pendente lite. Her petition, as is the practice, is not supported by an affidavit on oath. The husband makes answer on oath. The wife in her petition states that his income is about 70,000*l.* a year. The respondent, the husband, in his answer, goes into very minute detail, and puts his income at a much lower figure. The registrar has these two figures before him. The wife's allegation is unsupported by oath, while the averment of the husband, on the other hand, is supported by an affidavit. Complaint is made that the registrar never had any evidence at all—that he decided the case without going into evidence, and that he ought to have heard evidence. The

course he seems to have taken is this: "I will give the wife credit for the extreme figure at which she places the income, namely, 70,000*l.* a year: I will adopt it for the purpose of the case: even then I am prepared to say that the 3000*l.* a year which I propose to allot to her is amply sufficient, having regard to her position in life and her necessities." Now, is he entitled to take that course? I think that he is; because, as I have already said, what we have to regard in apportioning alimony pendente lite is the amount which will be sufficient to maintain the wife in the rank and position of life which she has hitherto occupied. Here the husband is a baronet with a large income, as I will assume: can it be said that 3000*l.* a year is not an adequate sum to maintain the wife in the position in life she occupies till the hearing of the suit? Test it in this way: would not 3000*l.* a year be considered, in the case of a settlement, to be an adequate jointure for a widow who had been in the position of the wife of a baronet like the husband in the present case? I think it would. We are now asked to interfere with the discretion of the registrar, for it is clear that by the rules he has a discretion reposed in him; and we should not be justified in interfering with that discretion unless we thought that he had either proceeded on a wrong principle, or had exercised that discretion wrongly. I am not prepared to say that he has done either the one or the other; on the contrary, now that I know all the facts of the case, if it had come before me, as it came before the registrar, and subsequently before the judge, I should have arrived at the same conclusion at which they have arrived.

In my opinion the appeal fails, and must be dismissed.

CHITTY L.J. The only question before us is whether we should order the husband to attend for cross-examination. It is plain, upon reading the two rules which have been referred to, that the wife has no right to compel the attendance of her husband for that purpose upon a petition for alimony pendente lite. It is plain there is a discretion reposed in the registrar in the first instance, and in the judge who hears the matter by way of appeal from the registrar. That is plain upon the

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Chitty L.J.

language of the rules; but there is one point which places this beyond question. Instead of directing cross-examination, the registrar and judge may say that the husband shall file a fuller and better answer. I pass by that, holding clearly that it is a discretion in the registrar or judge—a discretion to be exercised, like all other discretions, upon judicial principles. In this case the husband has not only put in an answer to the specific allegations with reference to his income made by the wife, but he has put upon his answer a singularly full and explicit statement of the facts. He has dealt with all the points mentioned by the wife in her petition—a petition which, one bears in mind, is not supported, nor, according to the practice, is required to be supported, by affidavit. He has given as full an account as a man in his position could be expected to give. He has shewn his income to be about 16,000*l.* a year. Is he to be cross-examined in order that that sum may be augmented to the very large sum which his wife says on cross-examination she will be able to make out is his true income? What has he done? He first deals with special investments, and shews specifically what he receives from them; and then he has dealt with the landed estate, and brought down the income of it to about 10,000*l.* a year. With regard to the latter, that is a material point. The husband could not be expected to give all the details with respect to the management of the property, and all the incidental charges for repairs, and allowances made to tenants; he has an agent who has made out a balance-sheet for three years. To cross-examine the husband on that balance-sheet would be an absurdity. If anyone should attend, it should be the agent, to explain that balance-sheet more fully. There is no further explanation on the matter that can reasonably be sought for.

Then with regard to the yearlings. The wife suggests that there is an income of 14,000*l.* a year from the yearlings. The answer, which bears upon the face of it the air of truth, states that there is not 14,000*l.* profit, but that, upon the whole, the yearlings cost so much, having regard to the way in which an establishment of that kind is kept up, that there is no great profit. Here, therefore, we have apparently a full, fair, and

explicit answer by the husband. I think the registrar exercised his discretion rightly in saying that it was not a case for cross-examination. The wife cannot ask for a further and fuller affidavit, because she cannot get one; therefore we shall not order one. The registrar has had regard to the position in life of the lady: she is the wife of a wealthy baronet. The registrar has taken all that into consideration, and he is not bound to give her a fifth or a sixth, or any particular proportion of income. He says: "It seems to me 3000*l.* a year is a reasonable allowance for a lady in her position during the pendency of the suit, and will support her in the condition of life which she has hitherto enjoyed." Mr. Bargrave Deane made some strong observations as to the advantages she had when living with the husband: she is now living apart from him, and I think she has a very handsome allowance. A jointure of 3000*l.* a year on this estate would be a provision of which no wife or widow could complain.

The result is, in my opinion, that we ought not to interfere with the discretion, as it has been exercised upon proper materials which have been properly considered in the Court below. I dissent altogether from the observation that the registrar is not entitled to read the papers before the case is heard. He had the facts plainly in his mind, and there is no ground for supposing that he went on any charges made by the husband against the wife, which charges would be altogether beside any point of alimony pendente lite.

Appeal dismissed with costs.

Solicitors: *Long & Gardiner; Hasties.*

G. I. F. C.

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EDWARDS *v.* EDWARDS AND WILSON.

Divorce—Practice—Co-respondent—Leave to Proceed without Co-respondent—Discretion of Judge—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 28.

The mere belief of a petitioner, founded on the evidence then before him, that a person accused of being the adulterer is not guilty, is not in itself sufficient to excuse him from making that person a co-respondent; if, however, the Court is satisfied that no evidence can be obtained against the accused person, it may exercise its discretion under s. 28 of the Matrimonial Causes Act, 1857, and allow the petitioner to proceed without joining him as co-respondent.

Jones v. *Jones*, [1896] P. 165, and *Saunders* v. *Saunders*, [1897] P. 89, considered and explained.

APPLICATION for leave to proceed without making a co-respondent other than the co-respondent Wilson. The following statement of facts is taken from the written judgment of the President.

The petitioner in this case, David Edwards, seeks to be relieved under s. 28 of the Matrimonial Causes Act, 1857, from making a certain person, whom I will call A. B., a co-respondent. On January 13, 1897, the wife presented a petition for judicial separation in which she alleged several acts of cruelty against her husband, and finally that on or about August 13, 1896, he compelled her to sign a confession to the effect that of a child of which she was then pregnant A. B. was the father, he having had connection with her on February 4, 1896, and on a previous occasion. On March 23, 1897, the petitioner presented a petition charging his wife with adultery with one Edward Wilson, and also alleging the birth of a child on August 19, 1896, of which he was not the father. The wife in reply denied the adultery, and asserted that her husband was the father of the child. On the application before me the petitioner alleged that he had used his best endeavours to discover the father of the child, but was unable to do so; that he believed the allegation of the wife as to the paternity of the

child to be false, and that he was not himself the father of the child. He produced letters from A. B.—one as early as October, 1896—denying adultery with the wife in very emphatic terms. He also produced letters from his wife written soon after the birth of the child, which on the face of them (I say no more as the wife is defending the suit) appear to admit adultery, and, I think, go far to admit that the child is not her husband's. I considered these materials insufficient, as the petitioner did not deal with his wife's allegations as to the origin of the confession, or with the specific statements of that confession; and I gave the petitioner an opportunity to supplement his case, and, if he pleased, to inform me whether A. B. desired not to be made a co-respondent. He has now filed two further affidavits by himself, and added a letter from A. B. (1)

Bargrave Deane, Q.C. (*Ellis J. Griffith* with him), for the petitioner. The discretion of the Court, which, in accordance with the decision of the Court of Appeal in *Saunders* v. *Saunders* (2), should be exercised with regard to the circumstances of each particular case, ought here to be exercised in favour of dispensing with the joinder of this co-respondent. The respondent's confession is not evidence against the co-respondent; and it is abundantly clear that no evidence can be obtained against him, and that the petitioner himself believes in his innocence. Under those circumstances the petitioner ought not to be compelled to incur the costs of joining a co-respondent against whom he has no evidence; nor should the other party be made a co-respondent, if he is not desirous of being so joined.

Cur. adv. vult.

Aug. 12. SIR F. H. JEUNE, PRESIDENT. [After stating the facts as above, his Lordship proceeded:—]

In the case of *Jones* v. *Jones* (3) I am correctly reported as

(1) The affidavits dealt with the wife's allegations as to the circumstances under which the confession was made; the letter from A. B. stated that he did not desire to be made a co-respondent.

(2) [1897] P. 89.

(3) [1896] P. 165.

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having expressed to Gorell Barnes J. my belief that his judgment was in accordance with the decisions I had previously given in similar cases. The subject has since been under the consideration of the Court of Appeal in *Saunders* v. *Saunders* (1), and I think it desirable to state how I conceive the practice now stands, having regard to the decision of that tribunal, which must of course be followed here.

The general effect of s. 28 of the Act of 1857 has long since been determined. In *Pitt* v. *Pitt* (2) Lord Penzance pointed out, and I gather on the whole that the same view is adopted by the Court of Appeal in *Saunders* v. *Saunders* (1), that the words "alleged adulterer" do not mean a person charged by name in the petition, but that in every case where adultery is charged there is an alleged adulterer. In other words, where adultery is alleged, ex necessitate rei an adulterer is alleged, though it may be that he cannot be identified with any person living or dead. Now, practically speaking, the discretion of the Court arises in hardly more than one state of circumstances. If the alleged adulterer be dead, or be actually unknown, for example, if he is a person whose identity is undiscoverable, as in the case of a woman detected in adultery where the man escapes, or if evidence shews a wife to have been guilty with some one, and, in confession, a name is given, but the existence of any such person cannot be ascertained, and perhaps even if a confession, or other evidence, implicates a known person, but one whom it is impossible to find, no question about the right to proceed without a co-respondent really arises. On the other hand, if the alleged adulterer is a person whom the husband believes to be guilty, he must of course be made a co-respondent. But in the case of a petitioner being able, as he believes, to prove guilt against his wife, and part of the evidence against her pointing to a known man whom he states he cannot prove, and does not believe, to be guilty (a case which usually arises on a confession of the wife, and can hardly arise in any other way), it becomes a question whether such person should be named as a co-respondent. It has always appeared to me,

(1) [1897] P. 89. (2) (1868) L. R. 1 P. & M. 464.

therefore, that the mere belief of the petitioner, founded on the insufficiency of the evidence then before him, that a person accused of being the adulterer is not guilty, cannot be sufficient to excuse his being made a co-respondent, because, if so, there would practically never be a call on the Court to exercise its discretion; and I did not understand the language used by the learned judge in *Jones* v. *Jones* (1) to state more than this. Of a principle stated with this exact limitation, which can hardly be considered a rule, I do not understand the Court of Appeal to express disapproval. But if the petitioner can go further, and satisfy the Court that no evidence can be obtained against the man accused, then the authority of *Saunders* v. *Saunders* (2) shews that there may be a case for relieving the petitioner from making a co-respondent.

In the present case I have felt a difficulty mainly from two considerations—first, that the wife alleges that the confession implicating A. B. was dictated to her by her husband: in which case the husband must, one would suppose, have believed in the guilt of A. B.; and, secondly, that whether the husband is not the father of the child is in issue, and to be assured that A. B. is not, is a step towards the solution of that question. I have, therefore, considered all the evidence which the petitioner has laid before me with great care. I do not intend to deal with it in detail, because the case has yet to be tried, and though I believe I have not prejudged any question really in dispute, if I were to state all my reasons I might seem to have done so. But I have come to the conclusion that it is not reasonable to suppose that any evidence can be produced to convict A. B., and that there is no substantial risk of matters which the Court ought to know being left undisclosed by his remaining outside the suit.

There remains one further consideration. One of the objects of s. 28 was, as Lord Penzance suggested in *Carryer* v. *Carryer and Wilson* (3), that any one against whom adultery is alleged might have an opportunity to appear and defend his character. This is a consideration which was probably not deemed to arise

(1) [1896] P. 165. (2) [1897] P. 89.
(3) (1865) 4 Sw. & Tr. 94; 34 L. J. (P. M. & A.) 47.

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EDWARDS v. EDWARDS.

The President.

in *Saunders* v. *Saunders* (1), and was therefore not referred to; but its importance appears to me to be beyond question. It is, to my mind, nothing to say that there is at the time no legal evidence against the person accused. At the trial the wife may be called and may give such evidence; and in any case I think a man may fairly claim to have notice that it is intended to give evidence that a wife is guilty of adultery with him, though it may not be intended to prove him guilty of adultery with her. He is entitled to an opportunity, if he chooses to avail himself of it, of clearing his character openly and on oath. But the provision of the Act, so regarded, is for the protection of the accused person, and he may renounce the benefit of it. In the present case I am satisfied that A. B., while fully aware of the facts and perfectly competent to judge of any risk he may be incurring, is desirous not to be made a co-respondent. I am of opinion, therefore, that the petition should be allowed to proceed without making A. B. a co-respondent.

Solicitors for petitioner: *Minshall, Parry-Jones, Woosnam & Smith.*

(1) [1897] P. 89.

W. J. B.

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DIVORCE—*Co-respondent—Leave to Proceed without—Practice—Discretion of Judge—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28.

The mere belief of a petitioner, founded on the evidence then before him, that a person accused of being the adulterer is not guilty, is not in itself sufficient to excuse him from making that person a co-respondent; if, however, the Court is satisfied that no evidence can be obtained against the accused person, it may exercise its discretion under s. 28 of the Matrimonial Causes Act, 1857, and allow the petitioner to proceed without joining him as co-respondent.

Jones v. *Jones*, [1896] P. 165, and *Saunders* v. *Saunders*, [1897] P. 89, considered and explained. EDWARDS *v.* EDWARDS AND WILSON
Jeune Pres. 316

2. —— *Co-Respondent — Leave to proceed without—Practice—Petition for Divorce—Discretion of Judge — Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Divorce Court Rules*, 1865, *rr.* 4, 6.

The discretion given to the judge, by s. 28 of the Matrimonial Causes Act, 1857, to allow a petition for a divorce to proceed, on special grounds, without making any co-respondent, is to be exercised with regard to the principles laid down in or to be gathered from the Act and the Rules, and to the circumstances of each particular case, and cannot be fettered by any general rule of practice.

The rule laid down in *Jones* v. *Jones*, [1896] P. 165, at p. 170, disapproved as a rule of general application.

A husband, who had been absent from England for more than two years, ascertained, when he returned home, that his wife had recently given birth to a child, of which he was not the father. She registered the birth of the child, giving her own name as the mother, but without giving the name of any father. She took out a bastardy summons against H., whom she alleged to be the father of the child, but, at the time appointed for its hearing, she did not appear, and the summons was struck out. The husband did not believe that H. was the father of the child, and his solicitor, after making careful inquiry, was unable to obtain any evidence against H. H. was prepared to swear that he had never had intercourse with the wife. The husband presented a divorce petition, in which he alleged that the wife had committed adultery with a man whose name was unknown to him:—

Held, that the husband should be allowed to proceed with the petition without naming any co-respondent.

Decision of Gorell Barnes J. reversed by the Court of Appeal, A. L. Smith L.J. dissenting. SAUNDERS *v.* SAUNDERS - - - C. A. 89

DIVORCE—*continued.*

3. —— *Co-Respondent — Practice—Death of alleged Adulterer before Suit—Motion to dispense with making Co-Respondent.*

Where, in a petition for dissolution of marriage, adultery is charged with a person who died before the institution of divorce proceedings, the petitioner must apply to the Court for an order to be excused from making him a co-respondent, even though adultery be charged against a second person who has been made a co-respondent to the suit. SLAYTOR *v.* SLAYTOR AND JACKSON - - - - Jeune Pres. 85

4. —— *Costs—Order for Costs against Co-Respondent—Delay in enforcing Order—Leave to issue Execution—Practice.*

Where a decree nisi for dissolution of marriage has been made with costs against the co-respondent, and no steps have been taken for upwards of six years to enforce the order for costs, application should be made to the Court for an order that the petitioner be at liberty to issue execution against the co-respondent. GOODWIN *v.* GOODWIN AND ARNOLD - Jeune Pres. 87

5. —— *Maintenance—Permanent Maintenance—Income of Respondent—Voluntary Allowance to Husband—Practice.*

Where in a suit for dissolution of marriage or for judicial separation there has been a full inquiry into the husband's means upon an application for alimony pendente lite, the amount of permanent alimony or permanent maintenance to be allotted to the wife will be determined upon the evidence then given, without a repetition of such inquiry upon the petition for permanent alimony or maintenance.

For the purpose of determining the amount of permanent alimony or maintenance, recourse may be had to income of which the husband has no legal power to enforce the payment.

A husband, who was largely indebted to his brother, was in receipt of a voluntary allowance from him so long as he should remain out of the country:—

Held, that the voluntary allowance was properly included in the husband's income for the purpose of fixing the amount of permanent maintenance. BONSOR *v.* BONSOR - Jeune Pres. 77

6. —— *Nullity—Fraud—Pregnancy of Wife by another Man at Time of Marriage—Concealment by Wife from intended Husband.*

Concealment by a woman from her husband at the time of her marriage of the fact that she is then pregnant by another man does not render the marriage null and void. MOSS *v.* MOSS (otherwise ARCHER) - - Jeune Pres. 263

7. —— *Practice—Discretion of Court—Misconduct of Petitioner—Adultery—Wife's Petition—Wilful Neglect or Misconduct of Husband conducing to Wife's Adultery—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

The circumstances to be considered by the Court in exercising its discretion under s. 31 of the Divorce and Matrimonial Causes Act, 1857, to grant a divorce to a wife who has been guilty of adultery include the case of the husband causing or conducing to her adultery by his own wilful neglect or misconduct.

A husband, who had treated his wife with

DIVORCE—*continued.*

great cruelty during cohabitation, finally deserted her and went to live with another woman. More than seven years after the desertion the wife, not knowing whether her husband was alive, and without making inquiry, commenced to live with another man; the cohabitation continued long after the time when it came to the wife's knowledge that her husband was alive. Subsequently, and after the wife had ceased to live in adultery, her husband was convicted under the Criminal Law Amendment Act, 1885, of an aggravated offence on a young girl not amounting to rape:—

Held, that under the circumstances the wife's adultery did not disentitle her to a decree of dissolution of marriage. SYMONS *v.* SYMONS
Jeune Pres. 167

8. —— *Practice—Rehearing—Application for —Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s* 1—*Rules of Divorce Court*, 1865, *as amended in August*, 1885, *rule* 62.

An application for rehearing of a divorce cause tried by a judge without a jury must be made to a Divisional Court of the Probate, Divorce, and Admiralty Division according to rule 62 of the Divorce Rules, and not to the Court of Appeal, the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, applying only to causes or issues tried with a jury. SMITH *v.* SMITH
C. A. 293

9. —— *Practice—Trial—Notice of setting down for—New Trial—Surprise—Divorce Court Rules*, *rr.* 44, 47.

The solicitor of the petitioner for a divorce wrote to the respondent's solicitor a letter, headed with the title of the cause, in which he said, "I have set this cause down for trial." No other notice was served:—

Held, that this letter was a sufficient notice, within rule 44 of the Divorce Court Rules, of the cause having been set down for trial.

The respondent's solicitor, in the belief that a more formal notice ought to be given, did not watch the cause list, and the cause came on for trial without his knowledge, and a decree for a divorce was made in the absence of the respondent. She applied for a new trial on the ground of surprise.

The Court ordered a new trial on the undertaking of the solicitor personally to pay the costs thrown away. FLUISTER *v.* FLUISTER AND HUTTON
C. A. 22

10. —— *Restitution of Conjugal Rights — Alimony pendente lite—Answer of Husband— Cross-examination — Registrar — Discretion — Divorce Court Rules*, 1865, *rr.* 86, 191—*Practice Proceedings in Chambers—Evidence—Note of Registrar or Master.*

Upon a petition before the registrar for alimoney pendente lite, the wife is not entitled as a matter of course, under rules 86 and 191 of the Divorce Court Rules, 1865, to an order for cross-examination of her husband upon his answer, even though there may be a great discrepancy between the amount of his income as alleged by her in the petition and the amount as stated in his answer.

Whether the husband should be ordered to attend for cross-examination is a matter entirely for the discretion of the registrar, and the Court will not interfere with the exercise of his discretion unless satisfied that he has either proceeded on a wrong principle or has exercised his discretion wrongly.

Where there is no very great discrepancy between the two figures, it is not the practice of the Court to order the attendance of the husband for cross-examination.

Where a wife in her petition for alimony pendente lite put the income of her husband, a baronet, at 70,000*l.* a year, while the husband in his answer put it at 16,600*l.* only, supporting his statement by full and detailed particulars, the registrar, on the hearing of the petition, and the judge on appeal from him, refused an application by the wife for an order on the husband to attend for cross-examination, and allotted the wife 3000*l.* a year as alimony. On appeal to the Court of Appeal:—

Held, that 3000*l.* a year was an adequate allowance for the wife pendente lite, and that as the registrar had properly exercised his discretion in allotting that sum, the Court would not interfere by ordering the husband to attend for cross-examination as to his means.

On an appeal from an order of a registrar or master the Court will only recognise a note of the registrar or master as evidence of what took place before him, an affidavit by either party being inadmissible. SYKES *v.* SYKES - **C. A. 306**

11. —— *Restitution of Conjugal Rights—Substituted Service of Written Demand for Cohabitation—Rules of* 1869, *r.* 175.

Where the intended respondent in a suit for restitution of conjugal rights had left the country, and letters addressed to him by his wife at his last known residence and place of business respectively, and containing a written demand for cohabitation, had been returned through his solicitors, who declined to furnish her with her husband's address, the Court allowed substituted service of the demand for cohabitation required by rule 175 to be made on the husband's solicitors. *In re* TUCKER - - - **G. Barnes J. 83**

12. —— *Separation Deed—Allowance for Wife's Maintenance—Subsequent Alteration of Circumstances—Dissolution of Marriage—Judicial Separation—Alimony—Maintenance and Education of Children—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 32, 35—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *ss.* 4, 5—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1.

Notwithstanding that by an agreement for separation, made between a husband and wife on withdrawal of the wife's petition for divorce, the wife has agreed to accept from the husband a specified sum for maintenance, to be paid in any event whether the marriage should thereafter be dissolved or not, the Court has power under the Divorce Acts, after a decree for dissolution on a fresh petition by the wife based on misconduct of the husband since the agreement, to disregard the agreement and order permanent alimony to be paid to her at a rate exceeding the amount specified in the agreement, if the husband's

DIVORCE—*continued.*
means on inquiry permit: at all events, if the agreement does not contain an express covenant by the wife not to sue for increased alimony in the event of a divorce grounded on future misconduct of the husband. But whether such a covenant is valid, *quære.*

Again, when by a separation deed the wife has agreed to accept a specified sum for maintenance, the deed to become void if the marriage is afterwards "dissolved" for any future misconduct by either party, the Court has a similar power to order the payment of permanent alimony to the wife after a decree for judicial separation by reason of the husband's misconduct since the execution of the deed, if there has been such an alteration of circumstances as renders it unjust that the wife should be bound by the deed.

The statutory power of the Court in relation to the maintenance and education of children after a decree for judicial separation or for dissolution of marriage is not affected by any previous agreement between the parents.

Gandy v. *Gandy*, (1882) 7 P. D. 168; (1885) 30 Ch. D. 57, considered and explained. BISHOP *v.* BISHOP. JUDKINS *v.* JUDKINS - C. A. 138

DIVORCE COURT RULES, 1865, rr. 4, 6 89
See DIVORCE. 2.

—— —— rr. 44. 47 - - - - 22
See DIVORCE. 9.

—— —— rr. 62 - - - - 293
See DIVORCE. 8.

—— —— rr. 86, 191 - - - 306
See DIVORCE. 10.

DIVORCE COURT RULES, 1869, r. 175 - 83
See DIVORCE. 11.

DOCUMENTS—Custody and disposal—Power of Ordinary - - - - 208
See ECCLESIASTICAL LAW. 2.

ECCLESIASTICAL LAW— *Churchwarden—Criminal Suit against—Duty of Churchwarden with respect to Collections at Morning and Evening Service—Alms Dish—Usage of Church—Control of Churchwardens over Moneys Collected for Church Expenses—Jurisdiction.*

By the accustomed practice of a parish church, when collections from the congregation were made either at the morning or the evening service on Sundays, the collecting bags were brought after the collection up to the chancel steps and placed in the alms dish there held by the minister for the purpose of receiving the same and placing them on the Communion Table. One of the churchwardens of the parish was charged in a criminal suit with having committed offences against ecclesiastical law in that during the time he held office he had at the morning service on one Sunday and the evening service on another Sunday vexatiously refused to place the bag in which he had collected money from the congregation in the alms dish in accordance with the above practice. At the hearing these charges were sufficiently proved:—

Held, that, in so deviating from the practice in use in the matter, the respondent had offended against the laws ecclesiastical, and that he ought

ECCLESIASTICAL LAW—*continued.*
to follow such practice for the future unless otherwise ordered by the bishop.

Where collections for ordinary church expenses are made at the morning and evening services in parish churches, the churchwardens are the proper custodians of the moneys collected, and such moneys should be placed by them at a bank to an account in their joint names.

Semble: For unreasonably refusing to sign a joint cheque on such account for the payment of proper church expenses a churchwarden is liable to be articled in a criminal suit in the Ecclesiastical Court. HOWELL *v.* HOLDROYD
Consist. Ct. of Wakefield 198

2. — *Custody and Disposal of Records deposited amongst Archives of Diocese—Power of Ordinary to make Orders as to—Documents of special Historical Interest to Citizens of Foreign Sovereign State—Comity—Delivery up for transmission to Massachusetts of Manuscript History of Voyage of "Mayflower" and Plymouth Plantation, containing Entries of Births, Deaths, and Marriages.*

On the petition of the Ambassador of the United States of America, the Chancellor of the Diocese of London directed that the manuscript known as "The Log of the *Mayflower*," and containing the history of the voyage of that vessel to America in 1620 and of the then new-founded Plymouth plantation, together with entries of the births, marriages, and deaths of many of the first settlers in New England and their immediate descendants, should—as a record of the greatest national interest and importance to the President and citizens of the United States—be delivered out of the custody of the officials of the See of London to the Ambassador for the purpose of being transmitted to America, and there deposited under the official custody of the Governor of Massachusetts for the time being, on the conditions that a photographic facsimile reproduction of the manuscript, verified by affidavit, should be deposited in the registry of the Consistory Court of London, and that all proper facilities should be afforded by the future custodians of the original to persons desiring to make searches therein or of obtaining extracts therefrom, and that a certificate of the due delivery thereof, signed by the Governor of Massachusetts, of having received it, and testifying his acceptance of its custody on the conditions imposed, be transmitted to the registrar.

The Ambassador of the United States having ceased to hold office since the decree was made, the Court did not think fit to vary the decree; for in taking charge of the manuscript he was to act not as ambassador, but as the personal delegate of the Court. *In re* THE LOG OF THE MAYFLOWER - - Consist. Ct. of London 208

3. — *Faculty—Discretion—Refusal of Faculty—Chancel Screen Gates—Figures on Chancel Screen representing Our Lord upon the Cross, the Virgin Mary, and St. John—Evidence—Church Building Act*, 1845 (8 & 9 *Vict. c.* 70), *s.* 7—*Select Vestry—Effect of Resolution of Meeting of Pew-Renters of Parochial Chapel of Ease.*

A petition by the vicar and churchwardens of the parish church of R., and the chapelwardens of a chapel of ease in the parish of R., asking for

ECCLESIASTICAL LAW—*continued.*

a faculty to authorize the erection in the chapel of a chancel screen with gates, and with a crucifix and figures of the Virgin Mary and St. John placed on the top of the screen, was supported by a resolution of a meeting of the pew-renters of the chapel. The vestry for ecclesiastical purposes of the parochial area in which both the parish church and the chapel of ease were situate, was a select vestry of the whole civil parish of R., which comprised a larger area than the parochial area above mentioned, and the vestry had passed no resolution either in favour of or against the grant of the faculty:—

Held,

(i.) That a resolution of the select vestry might be dispensed with.

(ii.) That a faculty for chancel screen gates ought not to be granted.

(iii.) That a faculty for a crucifix with or without figures on either side placed on a chancel screen ought not to be granted.

VICAR OF RICHMOND AND CHAPELWARDENS OF ST. MATTHIAS, RICHMOND *v.* ALL PERSONS HAVING INTEREST, &c. - **Consist. Ct. of Rochester 70**

4. — *Faculty—Jurisdiction—Affixing of Military Colours to Walls of Chancel of Parish Church—Interest—Member of Parliament—St. Margaret's, Westminster — Churchwardens — Confirmatory Faculty.*

The Ordinary has jurisdiction to authorize by faculty the affixing of military colours as church ornaments to the walls of the chancel of a parish church where it appears that a former rector of the church has approved of their being placed in the chancel.

The rector of a parish church has no legal right without the sanction of a faculty to remove out of the chancel church ornaments, such as military colours, placed there without a faculty in a permanent position with the concurrence of a former rector and former churchwardens.

A member of the Commons House of Parliament has a sufficient interest to institute a faculty suit in respect of alterations in or additions to the parish church of St. Margaret's, Westminster:—

Semble, the churchwardens of a parish church to which military colours, no longer required for use in Her Majesty's service, have been presented, have vested in them the legal property in the colours for the purpose of safe custody in all cases where the colours are not affixed to the freehold. VINCENT AND TOMLINSON *v.* EYTON **Consist. Ct. of London 1**

5. — *Faculty—Restoration of Chancel Screen—Figures of Our Lord upon the Cross, St. Mary, and St. John—Architectural Decorations not likely to be abused by Superstitious Reverence.*

A crucifix with the accompanying figures of the Virgin Mary and St. John is not forbidden by law to be erected on a chancel screen, but may be placed in that position in a parish church under a faculty where the Ordinary is satisfied that it is not likely to be abused by superstitious reverence being paid to it.

A faculty authorizing the restoration in a parish church of a stone chancel screen or interior chancel arch of pre-Reformation date by placing on three existing pedestals springing from ornamental tracery in the upper parts of such screen or interior arch three stone figures without gilding or painting, each two feet three inches high—one, the central figure, representing Our Lord upon the Cross, and the other two representing respectively the Virgin Mary and St. John—was granted by the Consistory Court of St. Alban's on the Ordinary being satisfied that the figures would be for the purpose of architectural decoration only, and that there was no ground for reasonable apprehension that they would be abused or made the subject of superstitious reverence. GREAT BARDFIELD (VICAR OF) *v.* ALL HAVING INTEREST **Consist. Ct. of St. Albans 185**

EDUCATION—Infants—Judicial separation—Alimony - - - - - - **138**
See DIVORCE. 12.

EVIDENCE—Declarations of testator after date of will—Admissibility - - **40**
See PROBATE. 1.

—— Proceedings in chambers—Note of registrar or master - - - - **306**
See DIVORCE. 10.

—— Select vestry—Resolution of meeting of pew-renters - - - - **70**
See ECCLESIASTICAL LAW. 3.

EXECUTION—Leave to issue—Order for costs—Delay - - - - **87**
See DIVORCE. 4.

—— Will—Evidence—Admissibility - **40**
See PROBATE. 1.

FACULTY—Affixing military colours to walls of chancel—Jurisdiction - - **1**
See ECCLESIASTICAL LAW. 4.

—— Refusal of—Chancel screen gates - **70**
See ECCLESIASTICAL LAW. 3.

—— Restoration of chancel screen—Superstitious reverence - - - - **185**
See ECCLESIASTICAL LAW. 5.

FOREIGN CORPORATION—Service of writ—Agent - - - - - **18**
See PRACTICE.

FOREIGN COURT—Right to claimants in, to participate—Damages - - **178**
See SHIP. 5.

FOREIGN STATE—Delivery up of document of interest to—Comity - - **208**
See ECCLESIASTICAL LAW. 2.

FORFEITURE—Wages—Deductions—Desertion
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FRAUD—Pregnancy—Concealment by wife from intended husband—Nullity of marriage
See DIVORCE. 6. **263**

GRANT—Limited administration—Person entitled to grant abroad - - **82**
See PROBATE. 2.

—— Probate—Conditional will - **28, 36**
See PROBATE. 3, 4.

—— Probate—Incorporated document—Library catalogue - - - - - **261**
See PROBATE. 5.

GRANT—*continued.*
—— Probate—Will—Revocation—Revival 223
See PROBATE. 6.

GRATUITY—To master—Merchant Shipping Act
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GUARANTEE—Lis alibi pendens—Staying proceedings - - - - 13
See SHIP. 12.

HARBOUR AUTHORITY—Duty of—Towage—Stranding - - - - 118
See SHIP. 7.

HEAT—Damage to cargo by—Bill of lading—Exceptions—"Accidents of the seas"
See SHIP. 1. 301

HUSBAND AND WIFE—*Desertion—Neglect to Provide Reasonable Maintenance—Cohabitation—Jurisdiction of Justices—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict.* c. 39), *s.* 4.

In order to give jurisdiction to justices under so much of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, as provides that any married woman, whose husband shall have deserted her, or been guilty of wilful neglect to provide reasonable maintenance for her, and shall by such neglect have caused her to leave and live separately and apart from him, may apply to a court of summary jurisdiction for an order under the Act, it is essential that there should be a cohabitation which is broken by the act of the husband; but such cohabitation does not necessarily imply that the parties must be living together continually under one roof.

A married female domestic servant, who never lived with her husband under the same roof, was visited from time to time by him at the house of her mistress, and a child (which subsequently died) was born of the marriage in a lying-in hospital. The husband refused to receive his wife in the house where he lodged, or to give her any help towards her maintenance:—

Held, that the cohabitation was sufficient to give jurisdiction to the justices under the above section to make an order under the Act.

Fitzgerald v. *Fitzgerald*, (1869) L. R. 1 P. & M. 694, and *Reg.* v. *Leresche*, [1891] 2 Q. B. 418, explained and distinguished. BRADSHAW *v.* BRADSHAW - Jeune Pres. and G. Barnes J. 24

—— Divorce.
See Cases under DIVORCE.

INCORPORATION — Probate — Will — Library catalogue - - - - 261
See PROBATE. 5.

INFANT—Maintenance and education—Dissolution of marriage - - - 138
See DIVORCE. 12.

INSURANCE—Interest on life claims—Liability
See SHIP. 5, 9. 178, 183, n.

INTEREST—Life claims—Liability 178, 183, n.
See SHIP. 5, 9.

JUDICIAL SEPARATION — Alimony — Maintenance of children - - 138
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JURISDICTION—Criminal suit against churchwarden—Alms dish - - 198
See ECCLESIASTICAL LAW. 1.

—— Faculty—Affixing military colours to walls of chancel - - - - 1
See ECCLESIASTICAL LAW. 4.

—— Justices—Desertion—Maintenance - 24
See HUSBAND AND WIFE.

JURY — Trial by — Admiralty jurisdiction — County court—Practice - - 279
See SHIP. 11.

JUSTICES — Jurisdiction — Desertion — Maintenance - - - - 24
See HUSBAND AND WIFE.

LIBRARY CATALOGUE — Probate—Will—Incorporated document—Custody - 261
See PROBATE. 5.

LIEN — Necessaries — Bunker coal—Maritime lien - - - - - 226
See SHIP. 10.

LIFE INSURANCE—Interest on life claims—Liability - - - 178, 183, n.
See SHIP. 5, 9.

LIMITATION—Liability—Right of claimants in foreign court to participate - 178
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LIMITED ADMINISTRATION—Person entitled to grant abroad—Practice - 82
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LIS ALIBI PENDENS—Action in rem—Guarantee—Staying proceedings - - 13
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MAINTENANCE—Income of respondent—Voluntary allowance—Practice - - 77
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—— Neglect to provide—Desertion - 24
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—— Separation deed—Dissolution of marriage—Alimony - - - - 138
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MARRIAGE—Dissolution of.
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—— Nullity—Pregnancy—Concealment by wife from intended husband - - 263
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MASTER—Note of registrar or—Evidence—Proceedings in chambers - - 306
See DIVORCE. 10.

MATRIMONIAL CAUSES ACTS 89, 138, 167, 316
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MERCHANT SHIPPING ACT, 1894 - 53, 178,
See SHIP. 4—6, 10, 15. 226, 249, 295

MILITARY COLOURS — Affixing to walls of chancel—Faculty - - - 1
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MOTION—To dispense with making co-respondent - - - - - 85
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NECESSARIES—Coal—Action in rem—Master's lien - - - - - 226
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NEGLIGENCE — Contributory — Towage — Stranding—Salvage - - 105
See SHIP. 14.

NEW TRIAL—Surprise—Notice of setting down for trial - - - - 22
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NOTICE—Of setting down for trial—Practice—Surprise - - - - 22
See DIVORCE. 9.

NULLITY OF MARRIAGE—Pregnancy—Concealment by wife from intended husband
See DIVORCE. 6. 263

PASSENGER—Distressed seamen — Compulsory pilotage - - - 295
See SHIP. 4.

PETITION—Leave to proceed without co-respondent—Practice - - - 89
See DIVORCE. 2.

PILOTAGE—Compulsory — Collision — Liability of owner - - - - 295
See SHIP. 4.

PRACTICE—*Service of Writ—Foreign Corporation—Agent—Clerk — Admiralty — Rules of Supreme Court, Order* IX., *r.* 8.

The defendants, a foreign corporation, had their name on the door of an office of their agents in London, and issued business cards and advertisements directing the public to apply to them there respecting the carriage of goods by their steamers running between Tilbury and Ostend. The rent of the office was paid by the agents of the defendants, and the clerks, including the manager, employed in the office, were the servants of the agents.

The plaintiffs, owners of cargo in a foreign ship, commenced an action for damages by collision against the defendants, and served the writ of summons on the managing clerk at the office in London. On motion by the defendants to set aside the service:—

Held, by Gorell Barnes J., that the service of the writ was not on "the . . . . clerk . . . . of such corporation" within the meaning of Order IX., r. 8, of the Rules of the Supreme Court, 1883, and must therefore be set aside, but without costs, as the defendants had held themselves out as having an office in London. THE PRINCESSE CLÉMENTINE - - Gorell Barnes J. 18

—— Arrest—Action in rem—Guarantee - 13
See SHIP. 12.

—— Costs—Security for—Appeal - - 118
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—— County court—Admiralty jurisdiction 279
See SHIP. 11.

—— Divorce.
See Cases under DIVORCE.

PRACTICE—*continued.*

—— Settlement of action—Change of ownership Action in rem - - - 226
See SHIP. 10.

PREGNANCY — Concealment by wife from intended husband—Nullity of marriage
See DIVORCE. 6. 263

PROBATE—*Evidence—Admissibility—Execution of Will—Execution in Duplicate—Revocation—Destruction of One Part—Declarations of Testator after Date of Will.*

Declarations made by a testator after the date of an alleged will are not admissible to prove the execution of the will, and they are equally inadmissible to prove that the will was executed in duplicate.

Sugden v. *Lord St. Leonards*, (1876) 1 P. D. 154, explained.

In order to prove that a testatrix had executed her will in duplicate, and that she had revoked the will by destroying one of the parts, evidence was tendered of oral declarations to that effect, made by the testatrix after the date of the will:—

Held, that these declarations were inadmissible.

Decision of Gorell Barnes J. affirmed. ATKINSON *v.* MORRIS - - - C. A. 40

2. —— *Grant of Administration — Limited Administration—Person entitled to Grant Abroad—Immediate Grant necessary—Grant to Stranger — Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

At the time of the death of an intestate his next of kin were in the interior of Bolivia, where it took six weeks to communicate with them by telegram, and four months by letter. The Court, being satisfied that an immediate representation was necessary for the preservation of the personal estate, made a general grant to a member of a firm of accountants in London in whose hands the books of the intestate's firm had been placed, limited until such time as the next of kin should apply to take a full grant, and ordered the administrator to give justifying security. IN THE GOODS OF SUAREZ - - Gorell Barnes J. 82

3. —— *Grant of Probate—Conditional Will.*

A testator, a Scotsman, by his will gave the residue of his estate to his wife for life during widowhood, and in case of her re-marriage gave her one-third for life, the remainder to various legatees. There was no disposition of the residue after the wife's death in the event of her remaining a widow.

The testator, being about to sail with his wife from Calcutta to England, wrote a letter to his brother in England, which was in form a good testamentary document at Scots law, and contained the following: "If anything happens to us on the way my will has been accidentally packed away in a tin box to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan." The letter then proceeded to deal with the disposition of his estate after his wife's death, in the event of her surviving him. Neither the testator nor his wife died during the voyage:—

Held, that the letter was not conditional, but

PROBATE—*continued.*
was a valid testamentary document, and must be admitted to probate. HALFORD *v.* HALFORD. (BRYCE, INTERVENER) - - **Jeune Pres. 36**

4. —— *Grant of Probate—Conditional Will.*
The deceased, a military officer on active service, wrote to his sister a letter in which he made use of the following language: "If we remain here taking pahs for some time to come the chances are in favour of more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place there is money at . . . . Keep this until I ask you for it."

Held, that the disposition of the deceased's property was not dependent on his death while on active service; that the document was not therefore a conditional will; and that, being good as a military will, it was entitled to probate.

In the Goods of Robinson, (1870) L. R. 2 P. & M. 171, considered. IN THE GOODS OF SPRATT **Jeune Pres. 28**

5. —— *Grant of Probate—Incorporated Document—Will—Library Catalogue—Custody.*
A testator made a bequest to a college of his books as enumerated in his library catalogue, a voluminous document, a copy of which would entail considerable expense. Probate was granted of the will without requiring the catalogue to be brought into the Probate Registry under rules 12, 13 of the Rules of 1862, the college undertaking to hold the catalogue for the registry, and a note to that effect being made upon the probate. IN THE GOODS OF BALME - - **Jeune Pres. 261**

6. —— *Revocation — Will — Revival — Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 22.
A testatrix in 1889 made a will, and in 1892 instructed her solicitor to prepare a codicil, which she took away with her, but never executed. Later in 1892 she executed a fresh will, prepared by a different solicitor, revoking the former will. In 1893 she executed a codicil, prepared by her original solicitor, who was in ignorance of the existence of the second will, and believed that the codicil to the first will had been duly executed; this codicil purported to be a second codicil to the will of 1889, and to confirm "my said will and the first codicil thereto":—

Held, that the codicil, by its language, revived the earlier will, and that both the wills, together with the codicil, must be admitted to probate. IN THE GOODS OF CHILCOTT **Gorell Barnes J. 223**

PROOF—Burden of—Contract of towage—Duty of harbour authority - - **118**
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REGISTRAR—Note of master or—Evidence—Proceedings in chambers - - **306**
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RE-HEARING—Application for—Divorce cause—Practice - - - - **293**
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RESTITUTION OF CONJUGAL RIGHTS—Alimony—Cross-examination—Registrar—Discretion - - - - **306**
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RESTITUTION OF CONJUGAL RIGHTS—*contd.*
—— Substituted service of written demand for cohabitation - - - **83**
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RESTORATION—Chancel screen—Faculty **185**
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REVIVAL—Will—Revocation - - **223**
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REVOCATION—Will—Evidence—Admissibility
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—— Will—Revival - - - **223**
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RIBBLE NAVIGATION ACT, 1883—Harbour authority—Duty of—Stranding - **118**
See SHIP. 7.

RULE OF SUPREME COURT, Order IX. (Service of Writ of Summons), r. 8 - **18**
See PRACTICE.

SALVAGE—Derelict—Principles of assessment of award - - - - **59**
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—— Towage—Stranding—Contributory negligence - - - - **105**
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SECURITY FOR COSTS—Appeal—Practice **118**
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SEPARATION DEED—Dissolution of marriage—Alimony—Maintenance of children **138**
See DIVORCE. 12.

SERVICE—Substituted—Written demand for cohabitation - - - - **83**
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—— Writ—Foreign corporation—Agent - **18**
See PRACTICE.

SHIP—*Bill of Lading and Charterparty—Exceptions—"Accidents of the Seas"—Carriage by Steamship—Damage to Cargo by Heat—Proximate Cause.*
A cargo of oats and maize was shipped on the defendants' steamship under a bill of lading excepting "accidents of the seas." During the voyage, owing to exceptionally heavy weather, and for the safety of the ship, the ventilators were closed for about a week, with the result that the air in the holds nearest the engine-room space became heated and, not being able to escape, a portion of the cargo was damaged:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of the Court below, that the shipowner was not liable, for the contract was for the carriage of goods by a steamship, and the damage was due to the air, heated in the usual course of the voyage of a steamship, being unable to escape from the holds owing to the ventilators being necessarily closed, and, therefore, the severity of the weather was the proximate cause, and the damage covered by the exception. THE THRUNSCOE - - - **Div. Ct. 301**

2. —— *Charterparty—Bill of Lading—Damage to Cargo—Liberty to fill up for Steamer's Benefit—Deviation.*
By charterparty the defendants' vessel was to load a cargo of wheat at Marianople for Gibraltar

SHIP—*continued.*

for orders for a port in the United Kingdom or on the Continent between Havre and Hamburg, the master of the vessel, to avoid being frozen in at the port of loading, to be "at liberty to leave . . . . with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azoff or Mediterranean port for United Kingdom, Continent or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded . . . ."

The master, under this liberty, left Marianople with part of the cargo of wheat, and proceeded to Novorossisk, where he filled up for steamer's benefit with linseed. At Gibraltar he was ordered to deliver the wheat at Cardiff; but he first proceeded to King's Lynn, and there discharged the linseed. On the way between King's Lynn and Cardiff the wheat was damaged by fire. The plaintiffs, who were holders of the bill of lading incorporating the conditions of the charterparty, sued the defendants for the damage:—

Held, by Gorell Barnes J., that the defendants were liable as between King's Lynn and Cardiff, they had become insurers of the consignees of the wheat, for, though the usual exceptions in the bill of lading and charterparty would have covered the loss if it had occurred in the ordinary course of the voyage, the defendants were not entitled to deviate by taking the wheat round by King's Lynn, and could only discharge the linseed at a port on the way. THE DUNBETH

Gorell Barnes J. 133

3. —— *Collision—By-law* 20 *of the Regulations of the River Tyne*, 1884.

A collision occurred, in the daytime, about on the line of lights quarter of a mile outside the pierheads at the entrance to the River Tyne, between the plaintiffs' steamship going out and the defendants' steamship coming in. Gorell Barnes J. held the plaintiffs' steamship alone to blame for bad look-out, but that, having regard to the place of collision, the defendants' steamship had, by coming up from the southward too close to the pierheads, infringed by-law 20 of the Regulations of the River Tyne, 1884, as construed by the Court of Appeal in *The Harvest*, (1886) 11 P. D. 90:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.), that the defendants' steamship had not broken the rule, as it was not a question of actual distance, but whether the incoming vessel gave the other room to pass out in such a way as not to cause danger, and the defendants' steamship had left the plaintiffs' steamship sufficient room to go out and pass to the southward, provided the outgoing vessel had seen the incoming vessel over the pier, and acted as soon as possible. THE JOHN O'SCOTT C. A. 64

4. —— *Collision—Compulsory Pilotage—Liability of Owner—Passengers—Distressed Seamen—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 191, 192, 625.

A collision occurred, in Galleons Reach of the River Thames, between the plaintiffs' barge and the defendants' steamship, for which the pilot in charge of the steamship was found solely to blame. The steamship belonged to the port of London, and was, at the time, carrying five distressed

SHIP—*continued.*

British seamen under a conveyance order of a British consular officer at a foreign port pursuant to ss. 191, 192 of the Merchant Shipping Act, 1894, for whom the sum of 3*s.* each per day was paid by the Board of Trade. By s. 625 of the same Act a ship navigating within the limits of the port to which she belongs is exempt from compulsory pilotage in the London district "when not carrying passengers":—

Held, by Gorell Barnes J., that the distressed seamen were not passengers, within the meaning of the section of the statute, so as to make pilotage compulsory, and, therefore, the owners of the steamer were liable for the damage done to the barge. THE CLYMENE - Gorell Barnes J. 295

5. —— *Collision—Damages—Sale of Ship in Foreign Court—Limitation of Liability—Distribution of Proceeds—Right of Claimants in Foreign Court to Participate—Interest on Life Claims—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

After a collision between a British and a German steamship, in the North Sea, the German vessel sank with her cargo, and a large number of her crew and passengers were drowned. The British vessel put into Rotterdam, and was there proceeded against by the owners of the German vessel and by two claimants interested in cargo. The British vessel having been found alone to blame, she was sold by order of the Court, and the net proceeds paid out rateably to the three claimants.

The owners of the British vessel, as plaintiffs, having obtained a decree in a limitation action in this country, under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, paid into court an amount equal to 8*l.* per ton of their statutory liability with interest to date, and in respect of the life claims gave bail to pay the balance of 7*l.* per ton when required. On the question as to the right of those who had sued in Holland to participate in the distribution of this sum, and as to the allowance of interest on the 7*l.* per ton:—

Held, by Gorell Barnes J., that the owners of the German vessel, and the claimant in respect of cargo (the other claimant not taking part in the proceedings), were not debarred from proving against the fund in court to the full extent of their loss, but, in ascertaining the proportion receivable by them, credit must be given for the sums they had respectively been paid out of the proceeds of the sale of the ship, and the plaintiffs were entitled to take out of the fund a sum equal to the amounts received by the three claimants abroad. Also that, as part of the damages, 4 per cent. interest was payable on the sum representing 7*l.* per ton from the date of the collision until payment into court. THE CRATHIE

Gorell Barnes J. 178

6. —— *Collision—Narrow Channel—Swin Middle Lightship—Risk of Collision—Arts.* 18 *and* 21 *of the Regulations for Preventing Collisions at Sea*, 1884.

A collision occurred at night, between the plaintiffs' steamship, inward-bound, and the defendants' steamship, outward-bound, in the Swin Channel at the entrance to the River Thames, about halfway between the Swin Middle

SHIP—*continued.*
Lightship and the North-East Maplin Buoy. Both vessels were found to blame for not reducing speed under art. 18 of the Regulations of 1884 for Preventing Collisions at Sea.

The plaintiffs appealed on the ground that, by reversing at a quarter of a mile, their vessel had complied with art. 18:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.), affirming the decision of Gorell Barnes J., and on the authority of *The Beryl*, (1884) 9 P. D. 137, that the officer in charge of the plaintiffs' vessel having the green light of the defendants' vessel at a distance of half a mile on his port bow crossing to the wrong side of the channel, was not justified, before he stopped and reversed, in waiting to see if there would be a change of light until the vessels were only a quarter of a mile apart.

The plaintiffs' vessel, just prior to the collision, had passed to the southward and eastward of the Swin Middle Lightship, in accordance with the practice sanctioned by the cases of *The Minnie* and *The Corennie*, [1894] P. 336, and 338, n.:—

Held, by Gorell Barnes J., that as any difficulty in the navigation at this part of the river has now been removed by making the North-East Maplin Buoy an occulting gas-light buoy, reliance can no longer be placed on those two cases, and inward-bound steamships must treat the Swin Middle Lightship as midway in a narrow channel, and, when safe and practicable, pass it on their port hand, in order to comply with art. 21 of the Regulations of 1884 (now art. 25 of the Regulations of 1897). THE OPORTO - - **C. A. 249**

7. —— *Harbour Authority—Duty of—Damage—Stranding—Contract of Towage—Burden of Proof—Ribble Navigation Act*, 1883 (46 & 47 *Vict. c. cxv.*)—*Practice—Appeal—Security for Costs.*

By the Ribble Navigation and Preston Dock Act, 1883 (c. cxv.), the defendants are constituted the port and harbour authority for the port and harbour of Preston. As such authority, they levy tolls in respect of all vessels using the port and harbour, and make a charge for towage, only allowing tugs licensed by them to tow within the port and harbour. By the terms of the contract of towage, the master and crew of the tug became for the time being the servants of the tow.

The plaintiff's barque arrived at the mouth of the River Ribble with a cargo of timber for Preston. She was there lightened by the defendants, and, under the direction of their harbour-master, proceeded, in charge of a pilot, up the river in tow of a tug belonging to the defendants, preceded by two other vessels each in charge of a pilot and in tow of a tug. The three vessels started in due time to save the tide, and followed one another on account of the narrowness of the channel. From some unexplained cause the tug, chartered by the defendants to tow the leading vessel, slowed down, and took over an hour instead of thirty-five minutes to do the last five miles. The water in the meantime fell, and the plaintiff's barque, which was the last and deepest of the three, on arriving at the shallowest part, grounded and remained fast. In an action for the damage so sustained, the President (Sir F. H. Jeune) gave

SHIP—*continued.*
judgment for the defendants, on the ground that they were not answerable to the plaintiff for the failure of the leading tug:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.), reversing the decision of the President, that the defendants were liable, as they had failed to rebut the primâ facie case against them of negligence in obstructing the fairway, for it was an implied term of the contract between the plaintiff and the defendants that the defendants would take, and it lay on them to shew that they had taken, reasonable care to supply a properly equipped leading tug so as to enable the string of vessels to get up safely on the one tide.

The plaintiff, a foreigner residing abroad, on instituting his action, deposited 350*l.* by way of security. On judgment being given for the defendants, 308*l.* 13*s.* 10*d.* of this sum was paid over to the defendants by way of costs, and the balance returned to the plaintiff, who, on his appeal being successful, claimed the return of the costs:—

Held, by the Court of Appeal, that, in the circumstances, a stay would be granted, unless the plaintiff's solicitors gave an undertaking to refund any costs in the event of the defendants' appeal to the House of Lords being successful. THE RATATA - - - - **C. A. 118**

8. —— *Interest on Life Claims—Statutory Liability.*

The Victoria (reported on another point, (1888) 13 P. D. 125). In this case, under a decree dated October 25, 1887, the whole amount of statutory liability (15*l.* per ton) for loss of life and personal injury and for goods, was paid into court in one sum with interest from the date of the stranding of the ship until payment into court. THE VICTORIA - - - - **Butt J. 183, n.**

9. —— *Interest on Life Claims—Statutory Liability.*

In this case, under a decree dated May 10, 1887, the amount of statutory liability for goods (8*l.* per ton) was paid into court with interest from the date of the collision until payment, and bail was given to secure payment into court of the additional amount of statutory liability for loss of life, &c. (7*l.* per ton), with interest from the date of the collision until payment. THE ADA MELMORE - - - - **183, n.**

10. —— *Maritime Lien—Action in rem—Necessaries—Bunker Coal—Master's Lien—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 167—*Change of Ownership—Liability of res—Settlement of Action.*

The defendants, owners of a steamship, transferred the possession of it to a Glasgow firm subject to conditions in a contract for sale, by which the defendants were to remain registered owners, and in effect to become mortgagees until payment of the purchase-money. The Glasgow firm appointed the plaintiff master, and he, whilst on a voyage to the River Plate on account of that firm, and not having notice of the contract of sale, drew two bills of exchange on the Glasgow firm for bunker coal supplied to the vessel at the time the bills were drawn, but in pursuance of a coaling contract previously made in this country between

SHIP—*continued.*

the Glasgow firm and the coal merchants. The bills were dishonoured at maturity, and, the Glasgow firm having suspended payment, the defendants, as unpaid vendors, retook possession of the vessel. They then settled with the plaintiff an action in rem brought, in the name of the plaintiff, by the coal merchants, under an irrevocable mandate, executed by the plaintiff, authorizing them to exercise, in his name, the right of lien, which he claimed under s. 167 of the Merchant Shipping Act, 1894, against the vessel in respect of his liability as drawer of the two bills of which the coal merchants were the holders:—

Held, by Gorell Barnes J., that the settlement of the action was void as against the coal merchants to whom the plaintiff was liable on the bills, and this liability having been incurred by the plaintiff as master in the ordinary course of his employment on account of the ship, within the meaning of the statute, he had a valid maritime lien, which could be enforced against the vessel, though the coals were supplied on the credit of the Glasgow firm, and not of the defendants, whose property the ship was. THE RIPON CITY **Gorell Barnes J. 226**

11. — *Practice—Action in rem—County Court—Freight—Counter-claim for Wrongful Arrest—Trial by Jury — "Actions" — County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2, *sub-s.* 1—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 101.

In a proceeding in rem in a county court, under s. 2, sub-s. 1, of the County Courts Admiralty Jurisdiction Amendment Act, 1869, by a shipowner against cargo owners, for balance of freight, the defendants counter-claimed, under the same sub-section, for 100*l.* damages for wrongful arrest of the cargo, and, under s. 101 of the County Courts Act, 1888, required a jury to be summoned for the trial of the action. The judge refused to allow the jury to be sworn. On appeal:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.) affirming the decision of the county court judge, that, this being an Admiralty cause, the defendants were not entitled as of right to a jury, for the word "actions" in s. 101 of the County Courts Act, 1888, did not include Admiralty actions. THE THEODORA - - - - **Div. Ct. 279**

12. —— *Practice—Arrest—Action in rem—Guarantee—Lis Alibi Pendens—Staying Proceedings—Bail.*

A British and a German ship came into collision near Rotterdam. The agents at Rotterdam of the owners of the two vessels exchanged written agreements on behalf of the respective captains to give bail to the extent of 50,000 guilders to answer the damages, interest, and expenses to which the captains might be condemned in virtue of the sentence of a competent court, and for the purpose of serving the writ the domicil of the captains was stated to be at the offices of the respective agents. The agents also procured from Lloyd's surveyor at Rotterdam an estimate of the amount of damages sustained by each vessel, but owing, it was alleged, to the

SHIP—*continued.*

owners of the German ship insisting on this estimate being conclusive, further negotiations between the parties fell through; and on the arrival of the German ship in this country she was arrested in an action in rem at the suit of the owners of the British ship.

The owners of the German ship moved the Court for an order for her release and a stay of all proceedings:—

Held, by Gorell Barnes J., that the guarantee was no bar to the action in this country, the vessel not having been arrested in Holland, and there being no legal proceedings pending there.

The Christiansborg, (1885) 10 P. D. 141, distinguished. THE MANNHEIM **Gorell Barnes J. 13**

13. —— *Salvage — Derelict — Principles of Assessment of Award.*

Although there is no rule entitling the salvors of a derelict vessel, as of right, to a moiety, or other specific proportion, of the value of the property salved, and the reward is to be assessed upon the same principles as in other cases of salvage, still there are usually present, in the case of a derelict, at least three special elements which tend to enhance the award, namely, the high degree of danger to which the property to be salved is exposed, the difficulty of approaching the derelict vessel without any aid in boarding her, and the necessity, when taking her in tow, of supplying men to steer her, thereby exposing some of the salvors to additional risk, and rendering the salving vessel short-handed. THE JANET COURT - - - - - **Jeune Pres. 59**

14. —— *Salvage — Towage—Stranding—Control of Tug by Tow—Contributory Negligence—Inequitable Agreement.*

A barque, with a cargo of wheat from San Francisco, put into Falmouth for orders and left that port for Hull in tow under a contract to pay the tug a fixed sum. The tug set the courses without interference from the tow, but the latter regularly took soundings. When nearing the entrance to the Humber the weather became thick and, a sounding indicating shallower water, the master of the barque was about to signal to the tug, when his vessel took the ground, the wind at the time being light and the sea smooth. A second tug then came up, and, as her master would not take less, the master of the barque agreed to pay 500*l.* if she would assist the first tug in an endeavour to tow the vessel off that tide. The efforts of the two tugs proved unsuccessful, and the second tug, having been sent to Grimsby for more tugs, returned with two others, whilst men from the shore assisted the crew in jettisoning some of the cargo. The four tugs then took hold of the vessel and she came off, and was subsequently safely docked at Hull. The owners, masters, and crews of all four tugs claimed salvage. The defendants, the owners of ship, cargo, and freight, alleged that the stranding was due to the negligence of the first tug, and counter-claimed against her for the loss of cargo and for any salvage they might have to pay the other salvors. They further submitted that the agreement with the second tug should be set aside as unreasonable and made under duress:—

Held, by Gorell Barnes J., that the first tug

SHIP—*continued.*

was responsible for the direction of the course, and, having been negligent in respect of it and in not taking soundings, her claim for salvage must be dismissed, but that, on the authority of *Smith* v. *St. Lawrence Tow Boat Co.*, (1873) L. R. 5 P. C. 308, the counter-claim of the defendants must also be dismissed, as their master was guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather. As the second tug incurred no risk, the agreement with her must be set aside as unfair, and a reasonable sum for the whole of her salvage services awarded. As the two other tugs rendered their services at request, they were entitled to salvage though the vessel could have been got off without their assistance. The three last-mentioned tugs were also entitled to a small sum for docking, payable, as towage, by the ship only. THE ALTAIR
Gorell Barnes J. 105

15. —— *Wages — Forfeiture — Desertion — Deductions—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 232—*Gratuities to Master.*

In taking the accounts in an action in rem, in a county court, for wages and disbursements, the master was allowed to deduct, as against the Exchequer, from wages forfeited by desertion, the sum of 116*l.* for clothing supplied to the seamen, prior to their desertion, out of the slop chest kept by the master with the knowledge of the owners. He was also allowed to retain a sum of 45*l.*, being the total of three gratuities paid by consignees of cargo to him, and not credited to the ship. On appeal by the owners:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes J.), affirming the decision of the county court judge, first: that the "wages forfeited for desertion," which are to be paid into the Exchequer under s. 232 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), are the wages due after all proper deductions have been made, in which deductions may be included the price of stores supplied by the master to the seamen by way of advance of wages, with the knowledge of the owners, and secondly: that the master was entitled to retain sums given to him by consignees by way of gratuity for the efficient manner in which he had superintended the discharge of cargoes. THE PARKDALE
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